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WHAT INVESTIGATIVE RESOURCES DOES THE INTERNATIONAL CRIMINAL COURT NEED TO SUCCEED?: A GRAVITY-BASED APPROACH

STUART FORD*

I. INTRODUCTION

There is an ongoing debate about what resources the International Criminal Court (ICC) needs to be successful.¹ On one side of this debate are many of the Court's largest funders, including France, Germany, Britain, Italy, and Japan.² They have repeatedly opposed efforts to increase the Court's resources even as its workload has increased dramatically in recent years.³ On the other side of the debate is the Court itself and many of the Court's supporters within civil society.⁴ They have taken the position that it is underfunded and does not have sufficient resources to succeed.⁵ This debate has persisted for years and disagreements over the ICC's funding level are now a central feature of the Court's budgeting process.⁶

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1. See generally Stuart Ford, *How Much Money Does the ICC Need?*, in *THE LAW AND PRACTICE OF THE INTERNATIONAL CRIMINAL COURT* (Carsten Stahn ed., 2015).

2. *Id.* at 90.

3. *Id.* See also Elizabeth Evenson, *The ICC: Too Important to Let Fail*, HUMAN RIGHTS WATCH (Aug. 7, 2015), <https://www.hrw.org/news/2015/08/07/icc-too-important-let-fail>.

4. See Ford, *supra* note 1, at 89–92.

5. *Id.*

6. See Ford, *supra* note 1, at 92–94 (noting that the Assembly of State Parties ultimately increased the ICC's budget for 2013 despite those countries advocating for a zero growth policy, but that the increase was still less than the ICC had asked for). Essentially the same thing happened in 2014. See Lilian Ochieng & Simon Jennings, *ICC Secures Budget Increase*, INSTITUTE FOR WAR &

As this long-running debate demonstrates, reaching an agreement on the level of resources the ICC needs is very difficult. This Article contributes to that debate by using an empirical gravity-based approach to understand what investigative resources the ICC needs to succeed. This is an important part of the overall question of what resources the Court needs because the investigations are a critical and sizable component of the ICC's work. First, the investigations are critical because successful investigations are a necessary predicate to the trials that are the principal work of the ICC.⁷ Second, the investigations are a sizable part of the Court's work because they are very resource intensive.⁸ Thus, understanding what resources the ICC needs to complete successful investigations is important in determining what resources the Court needs as a whole.

This Article assesses the ICC's needs by looking at the investigative resources that states assign to domestic mass atrocity crimes and then comparing them to the investigative resources available to the ICC.⁹ One would expect that similar crimes would require similar resources to investigate. Thus, the resources devoted to domestic atrocity crime investigations can shed light on what resources the ICC needs to be successful. If the ICC has similar resources to those devoted to domestic mass atrocity investigations, this suggests that the ICC is adequately resourced. If, on the other hand, the ICC has fewer resources to conduct its investigations than domestic systems use in comparable circumstances, this suggests that the ICC is under-resourced.

PEACE REPORTING (Jan. 20, 2014), <https://iwpr.net/global-voices/icc-secures-budget-increase>. The same thing is set to occur in 2016 as well. See Coalition for the ICC, ASP 14: Negotiating the 2016 ICC Budget (Nov. 13, 2015), <https://cicglobaljustice.wordpress.com/2015/11/13/asp14-the-courts-budget-for-2016-tackling-iccs-capacity-crisis/> (noting that the ASP's Committee on Budget and Finance has recommended a budget increase over 2015 but one that is smaller than the Court has requested).

7. See *infra* text accompanying notes 138–39.

8. For example, according to the 2016 budget, the OTP has a total of 218 personnel. See Assembly of State Parties, Proposed Programme Budget for 2016 of the International Criminal Court, doc. no. ICC-ASP/14/10 (Sept. 2, 2015), *tbl.20*. Of those 218 personnel, almost half—103—work in the Investigation Division. See *id.* *tbl.32*. For comparison purposes, the Prosecution Division only has 45 personnel. *Id.* *tbl.35*. Thus, the investigations require nearly half of the OTP's total personnel and more than twice as many personnel as the trials.

9. In many ways, this Article can be seen as complementary to an earlier article, *Complexity and Efficiency at International Criminal Courts*, which measured the relative efficiency of the trials at domestic and international courts. See Stuart Ford, *Complexity and Efficiency at International Criminal Courts*, 29 EMORY INT'L L. REV. 1 (2014). This Article makes an analogous comparison between domestic and international systems but focuses on the investigations rather than the trials.

This comparison depends on a way to measure and compare domestic and international crimes. This Article uses the concept of gravity for that purpose. At its simplest, gravity refers to the seriousness of the crime.¹⁰ It is not, however, an objective characteristic of crimes that can be easily or directly measured.¹¹ Moreover, there is no generally accepted definition of gravity that already exists and can be applied to mass atrocity crimes.¹² Thus, the first step in comparing the gravity of different crimes is finding a way to measure gravity.

One of this Article's most important contributions is its creation of an empirical measure of crime gravity. This measure is based upon a synthesis of the work of the Office of the Prosecutor (OTP) at the ICC, the jurisprudence of the Court, the existing scholarship on the gravity of international crimes, and domestic studies of crime severity. The result is a measure comprised of both quantitative and qualitative factors that permits the relative gravity of different crimes to be assessed. This allows the crimes investigated by the ICC to be compared to crimes investigated in domestic systems.

Once the crimes investigated at the ICC are compared to the most serious mass atrocity crimes investigated in domestic systems, it becomes clear that the crimes typically investigated by the ICC are of greater gravity than the most serious mass atrocity crimes investigated by states.¹³ The crimes typically investigated by the ICC occur in more places and over a longer period of time. They involve more victims of all kinds, including more murder victims, and also regularly involve acts of exceptional cruelty. They involve a number of types of victimization that are not present in the domestic mass atrocity crimes, including rape, torture, unlawful detention, and the forcible displacement of the civilian population. In addition, they have a larger impact on the societies where they occur. In short, they are more grave.

As a result of their greater gravity, one would expect that investigating the crimes that come before the ICC would require greater resources than investigating domestic mass atrocities. Yet, a comparison of the investigative resources available to the ICC and the investigative resources committed to domestic investigations show that national governments are

10. See *infra* text accompanying notes 23–26.

11. Cf. *id.* at 19 (noting the difference between subjective and objective characteristics).

12. See Margaret M. deGuzman, *Choosing to Prosecute: Expressive Selection at the International Criminal Court*, 33 MICH. J. INT'L L. 265, 269 (2012) (noting that “there is little agreement” about how to define gravity).

13. See *infra* Part III.D.

willing to devote vastly more resources to domestic mass atrocity investigations.¹⁴ In fact, states faced with mass atrocity crimes have been willing to devote dozens to hundreds of times more resources to those investigations than the ICC is able to devote to its own investigations. This disparity is startling and highlights how the ICC has tried to investigate some of the most serious crimes imaginable with meager resources.

There are three main conclusions that can be drawn from the comparison of the investigative resources available in domestic and international crimes. First, and most obviously, the ICC does not have sufficient investigative resources. It has significantly fewer resources than states think is appropriate when investigating similar atrocity crimes committed on their own territory. Second, this lack of resources has contributed to the ICC's relative lack of success so far. The ICC's investigations have been too "thin" and several prosecutions have collapsed or been compromised as a result.¹⁵ There are, of course, other reasons for the difficulties the ICC has experienced.¹⁶ Nevertheless, the ICC's lack of resources is also to blame for its failure to live up to its members' expectations. Third, increasing the ICC's investigative resources would be an important step in improving the Court's outcomes. The comparison between domestic and international investigations suggests that the ICC would be more successful if it had the resources to conduct investigations more like those carried out in response to domestic mass atrocity crimes. Given that most states agree that a successful ICC is desirable,¹⁷ it follows that most states should support increasing the ICC's investigative resources because doing so would be in their own interest.

This Article will proceed as follows. Part II explores the meaning of crime gravity and its relationship to investigative difficulty. Part III explores the gravity of the average ICC investigation and compares that to a range of domestic mass atrocity investigations. Part IV describes the investigative resources available during the average ICC investigation and compares that to the resources available in domestic mass atrocity investigations. Finally, Part V contains this Article's conclusions.

14. See *infra* Part IV.C.

15. See *infra* text accompanying notes 409–11.

16. See, e.g., *infra* text accompanying notes 412–23 (noting that lack of state cooperation and some strategic mistakes have also hampered ICC investigations).

17. See *infra* text accompanying notes 431–35.

II. THE GRAVITY OF CRIMES

The concept of gravity is central to this Article. Gravity serves as the key to comparing the crimes investigated at the ICC to crimes investigated in domestic systems. Without a measure of gravity how could one meaningfully compare the shooting down of MH17 over Ukraine to the bombing of Pan-Am flight 103 over Lockerbie?¹⁸ Or, how could one compare the London train bombings to the attack on the Oklahoma City federal building?¹⁹ It would be even more difficult to compare these domestic crimes to the crimes investigated by the ICC, like the post-election violence in Kenya or the attacks on civilian protesters in Libya.²⁰ Certainly all of these crimes are very serious, but they are also different. They are carried out in different ways, by different groups, for different purposes, occur in different places, over different time periods, and result in different numbers of victims of different types. They are all serious, but which is more serious and why?²¹ Creating a measure of relative gravity permits crimes committed in different jurisdictions to be compared to one another meaningfully.

Gravity also serves a second purpose in this Article. In addition to measuring the seriousness of crimes, it serves as a proxy for the difficulty of the resulting criminal investigation. This is because the investigative resources necessary to successfully investigate a crime increase as the gravity of the crime being investigated increases.²² Thus, gravity can be used to make inferences about the investigative resources that one would need to successfully investigate different crimes. One would expect that crimes of similar gravity would be assigned similar investigative resources, while crimes of greater gravity would require greater investigative resources. Less grave crimes, on the other hand, would usually require fewer investigative resources. This relationship between gravity and investigative resources makes it possible to evaluate the level of investigative resources available to the ICC by comparing the ICC's resources to the resources available in domestic investigations of comparable gravity. If the ICC consistently has fewer resources than

18. See discussion *infra* Parts III.C.7, III.C.1.

19. See discussion *infra* Parts III.C.5, III.C.3.

20. See discussion *infra* Parts III.A.6, II.A.4.

21. See deGuzman, *supra* note 12 (arguing that there is not widespread agreement about how to identify the gravest crimes and that different people may reasonably use different criteria).

22. See discussion *infra* Part II.C.

domestic investigations despite investigating similarly grave crimes, this suggests that the ICC is under-resourced.

Without a way to measure gravity, this Article would not be possible. Thus, the first step is to define gravity and find a way to measure it. The second step is to explore the relationship between gravity and investigative difficulty. Both of these issues are addressed below.

A. Defining Gravity

Generally, gravity refers to the importance or seriousness of a phenomenon.²³ Of course, it has other meanings,²⁴ but in this Article it refers to the importance or seriousness of a crime or group of related crimes. The concept of crime gravity is roughly synonymous with both crime severity and crime seriousness,²⁵ but this Article will use the term gravity over the alternatives because that is the term used in the Rome Statute of the International Criminal Court.²⁶

As a result of its inclusion in the Rome Statute, gravity is an important concept at the ICC.²⁷ The gravity of the crimes is a factor the Prosecutor must consider before initiating investigations.²⁸ In addition, the Court is required to consider whether the cases advanced by the Prosecutor are of sufficient gravity before it can hear them,²⁹ and gravity plays a role at sentencing.³⁰ In fact, the term is used nine times in the Rome Statute.³¹ In

23. See NEW OXFORD AMERICAN DICTIONARY (Angus Stevenson & Christine Lindberg eds., 3d ed. 2010) (defining gravity as “extreme or alarming importance; seriousness”).

24. See, e.g., *id.* (“the force that attracts a body toward the center of the earth”).

25. See Margaret M. deGuzman, *Gravity and the Legitimacy of the International Criminal Court*, 32 FORDHAM INT’L L.J. 1400, 1400 (2009) (noting that gravity and seriousness are synonymous).

26. The terms severity or seriousness will sometimes be used as alternatives to gravity for stylistic purposes, but they should be viewed as simply another way of saying gravity, unless the text explicitly indicates otherwise.

27. See generally deGuzman, *supra* note 25.

28. Rome Statute of the International Criminal Court art. 53(1)(c), July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute]. See also deGuzman, *supra* note 25, at 1412–15 (describing the Prosecutor’s obligation to consider gravity before initiating an investigation).

29. See Rome Statute art. 17(1)(d) (noting that the court is required to conclude that a case is of sufficient gravity before that case is admissible before the court).

30. *Id.* art. 78(1) (noting that the court “shall” consider the gravity of the crime when determining the sentence).

31. *Id.* art. 7(1)(g) (referring to the gravity of crimes of sexual violence); art. 17(1)(d) (referring to the gravity of individual cases); art. 53(1)(c) (referring to the gravity of the crimes being investigated); art. 53(2)(c) (referring to the gravity of the crimes being investigated); art. 59(3) (referring to the gravity of the crimes being charged); art. 77(1)(b) (referring to the gravity of the crimes for which an individual has been found guilty); art. 78(1) (referring to the gravity of the crimes for which an individual has been found guilty); art. 84(1)(c) (referring to the gravity of official misconduct); art. 90(7)(b) (referring to the gravity of the charged conduct).

all but one of those instances, it refers to the seriousness of criminal conduct.³²

Despite requiring various organs within the ICC to make determinations about the gravity of crimes, the Rome Statute does not define the term.³³ Nevertheless, the OTP must have a way to evaluate the gravity of crimes because the OTP cannot open an investigation unless the crimes being investigated are of sufficient gravity,³⁴ and it cannot send a case to trial unless the charges are sufficiently grave.³⁵ Thus, it makes sense to begin searching for a measure of gravity by looking at the definition that has been adopted by the OTP.

1. *The OTP's Definition*

The OTP must have a way to assess the gravity of crimes so that it can comply with the requirements of the Rome Statute.³⁶ And indeed, the OTP has developed a definition that it uses to evaluate the relative gravity of the crimes it investigates and prosecutes.³⁷ This definition is set out in the OTP's internal regulations, which state that the gravity of crimes should be measured based on: (1) their scale; (2) their nature; (3) the manner of their commission; and (4) their impact.³⁸ These four factors are vague and open-ended, and there have been calls for the OTP to explain in more detail what they mean.³⁹ Perhaps in response to those criticisms, the OTP

32. See *supra* note 31. The only time that the term gravity is used in the Rome Statute to refer to something other than the seriousness of criminal conduct is when it is used to refer to judicial misconduct that might serve as the basis for a revision of the conviction or sentence. See Rome Statute art. 84(1)(c).

33. See Susana SáCouto & Katherine Cleary, *The Gravity Threshold of the International Criminal Court*, 23 AM. U. INT'L L. REV. 807, 817 (2008) (noting that "because the term 'gravity' is not defined in the Rome Statute or any of the other governing documents of the ICC, the appropriate role of 'gravity' in the ICC remains a matter of debate"). But see deGuzman, *supra* note 25, at 1406–08 (arguing that some hints about the meaning of gravity can be deduced from the elements of the crimes that are within the court's subject matter jurisdiction).

34. See Rome Statute art. 53(a)(1)(c).

35. See Rome Statute art. 17(1)(d).

36. See *supra* text accompanying notes 34–35.

37. This definition evolved over time, and it took several years before it reached its current form. See SáCouto & Cleary, *supra* note 33, at 824–26 (2008) (noting that the OTP's definition of gravity developed over time).

38. See Office of the Prosecutor [OTP], *Regulations of the Office of the Prosecutor*, Doc. No. ICC-BD/05-01-09 (Apr. 23, 2009), at Reg. 29(2). See also Office of the Prosecutor, *Report on Preliminary Examination Activities (2015)* ¶ 7 (Nov. 12, 2015) (noting that gravity includes an assessment of the "scale, nature, manner of commission of the crimes, and their impact"); Office of the Prosecutor [OTP], *Policy Paper on Preliminary Examinations* ¶ 9 (Nov. 2013) (same).

39. See Ignaz Stegmiller, *The Gravity Threshold under the ICC Statute: Gravity Bach and Forth in Lubanga and Ntaganda*, 9 INT'L CRIM. L. REV. 547, 564 (2009) (noting that the four factors laid out

explained how it would evaluate each of the factors in its 2013 Policy Paper on Preliminary Examinations.

According to the OTP, the scale of the crimes can be assessed by looking at “the number of direct and indirect victims, the extent of the damage caused by the crimes, . . . [and] their geographical or temporal spread”⁴⁰ This factor focuses on the number of victims and the scope of the crimes. It acknowledges that crimes become more grave as the number of victims increases and as their geographic and temporal scope increases.

The nature of the crimes “refers to the specific elements of each offense such as the killings, rapes, and other crimes”⁴¹ In effect, the nature of the crimes refers to the specific kinds of wrongful acts that have been committed like murder, rape, or torture. It also implicitly recognizes that there is a hierarchy among crimes and that some kinds of crimes are graver than others. For example, as noted below, killings are generally viewed as more grave than rapes, which are in turn viewed as more grave than assaults.⁴²

The manner of the commission of the crimes focuses on how the crimes were carried out, in particular “the extent to which the crimes were systematic or result from a plan or organized policy . . . , [any] elements of particular cruelty, including the vulnerability of the victims, [and] any motives involving discrimination.”⁴³ This factor recognizes that even though two crimes may be legally equivalent (e.g., two murders), the way in which those crimes are carried out can affect their gravity.⁴⁴ Thus, crimes that are organized or systematic are more grave than crimes that lack this feature. Crimes that target vulnerable groups, like women, children or the elderly, are more grave than crimes that do not. Crimes of exceptional cruelty are more grave than the same crime carried out without exceptional cruelty.

Finally, the impact of the crimes is assessed by the “suffering[] endured by the victims . . . , or the social, economic and environmental damage inflicted on the affected communities.”⁴⁵ It thus focuses on the effect of the

in Internal Regulation 29(2) require further “definition” and proposing that the OTP enlarge upon their meaning in “another policy paper”).

40. *Policy Paper on Preliminary Examinations*, *supra* note 38, ¶ 62.

41. *Id.* ¶ 63.

42. *See infra* text accompanying note 110.

43. *Policy Paper on Preliminary Examinations*, *supra* note 38, ¶ 64.

44. *See infra* text accompanying note 112.

45. *Policy Paper on Preliminary Examinations*, *supra* note 38, ¶ 65.

crimes on the victims and their communities. It acknowledges that the consequences of the crimes for the victims also affect their gravity. Taken together, these four factors are used by the OTP to assess the potential gravity of crimes when considering whether to open an investigation.⁴⁶

The gravity evaluation is not a purely mathematical process and the OTP has acknowledged that it includes both “quantitative and qualitative considerations.”⁴⁷ Some factors, like the number of victims of various crimes, lend themselves to a quantitative approach. Other factors, like whether the crimes were carried out in an exceptionally cruel manner, are qualitative. These quantitative and qualitative factors are combined to assess the overall gravity of the crimes under consideration.

These factors could be used to create a measure of crime gravity, but is the OTP’s definition of gravity a good one? Is it the best one? The OTP has developed the most comprehensive definition of gravity of any of the organs at the ICC, but perhaps there are alternative definitions that are better? Thus, this Article will consider several alternative sources of a gravity definition. First, it will look at the drafting history of the Rome Statute to determine whether the creators of the ICC had a particular definition in mind. Next, it will look at the Court’s decisions on gravity. Third, it will consider the work of international criminal law scholars who have written about the gravity requirement in the Rome Statute. Finally, it will look beyond the ICC at the literature on domestic crime severity. Taken together, these should point the way to a definition that can be used as a basis for an empirical measure of crime gravity.

2. *The Drafting History of the Rome Statute*

While gravity is not defined in the Rome Statute,⁴⁸ one place to look for a definition is its drafting history.⁴⁹ The concept of gravity in international criminal law predates the Rome Statute by several decades.⁵⁰ The International Law Commission (ILC) began to focus on gravity in the 1980s as part of its work on a Draft Code of Crimes Against the Peace and

46. *Id.* ¶ 66.

47. See Policy Paper on Preliminary Examinations, *supra* note 38, ¶ 61 (noting that the ICC has taken the position that gravity “includes both quantitative and qualitative considerations”).

48. See *supra* text accompanying note 33.

49. See Vienna Convention on the Law of Treaties art. 32, May 23, 1969, 1155 U.N.T.S. 331 (indicating that the “preparatory work of a treaty” may be used as a supplementary means of interpreting the treaty).

50. See deGuzman, *supra* note 25, at 1416–21.

Security of Mankind.⁵¹ Some members of the ILC suggested using gravity to determine which international crimes should be included in the Draft Code.⁵² The ILC did eventually decide to focus on the gravest crimes for inclusion in the Draft Code, but it was never able to agree on a formal definition of gravity.⁵³

In the 1990s, the ILC began work on what would later become the Rome Statute.⁵⁴ One of the initial questions the ILC faced was which crimes to include within the jurisdiction of the Court. Some participants felt that all international crimes should be within the jurisdiction of the court, while others felt that only the gravest crimes should be included.⁵⁵ After much debate, the drafters of the Rome Statute eventually agreed that the ICC should focus on the gravest crimes, but they were again unable to agree on a formal definition of gravity.⁵⁶ As a result, the term ended up being used extensively in the Rome Statute but it is never defined.⁵⁷

This history demonstrates that at the time the Rome Statute was drafted everyone involved knew that gravity would play an important role at the ICC. The drafters were also aware of the lack of a definition, but were not able to supply the Court with an explicit definition.⁵⁸ In short, there was no agreement on a definition of gravity prior to the entry into force of the Rome Statute. Ultimately, the drafting history does not provide much insight into the meaning of gravity.⁵⁹

51. *Id.* at 1417. The Draft Code was an attempt to identify and codify the elements of international criminal law. See Stuart Ford, *Crimes Against Humanity at the Extraordinary Chambers in the Courts of Cambodia: Is a Connection with Armed Conflict Required?*, 24 UCLA PAC. BASIN L.J. 125, 153 (2007).

52. See deGuzman, *supra* note 25, at 1418.

53. *Id.* at 1418.

54. *Id.* at n.80.

55. *Id.* at 1419–20.

56. *Id.* at 1419–21, 1424. See also SáCouto & Cleary, *supra* note 33, at 820–23 (noting that the drafters of the Rome Statute consciously chose to retain gravity as a requirement but that no explicit definition of gravity was provided).

57. See *supra* text accompanying notes 27–33.

58. See, e.g., deGuzman, *supra* note 25, at 1424 (noting that the Chilean delegation at the Rome Conference specifically requested that gravity be defined but that there was insufficient support for the proposal).

59. The drafting history does indicate that all of the crimes within the jurisdiction of the ICC were considered by the drafters to be grave crimes. See *supra* text accompanying note 56. Unfortunately, this insight is not very useful in deriving an empirical measure of gravity.

3. *The Decisions*

The next logical place to look for guidance is in the Court's decisions. Since the Court is required to consider whether the cases that come before it are of sufficient gravity to be admissible,⁶⁰ gravity has been discussed in a number of cases. The first time it came up was in the *Lubanga* case. However, the Pre-Trial Chamber's decision on gravity in that case was harshly criticized by scholars and overruled by the Appeals Chamber.⁶¹ The Appeals Chamber did not, however, offer its own definition.⁶² This forced the Pre-Trial Chamber to essentially start over from scratch. This Article will focus on the court's subsequent attempts to define gravity.

In February 2010 in the *Abu Garda* case, Pre-Trial Chamber I proposed a new definition of gravity that focused on the "nature, manner and impact" of the alleged crimes.⁶³ Later decisions referenced the *Abu Garda* decision but reframed the definition of gravity into the four factors that the OTP is currently using: scale, nature, manner of commission, and impact.⁶⁴ While the latest decision contains an interesting disagreement between the judges of Pre-Trial Chamber I about how to apply those factors in the specific situation under consideration,⁶⁵ the Pre-Trial Chambers have consistently used the OTP's definition since 2010.

It is noticeable, however, that the Pre-Trial Chamber decisions are largely devoid of reasoning. To begin with, the *Abu Garda* decision's definition of gravity was proposed by the OTP.⁶⁶ The Pre-Trial Chamber's

60. See *supra* text accompanying note 29.

61. See deGuzman, *supra* note 25, at 1425–28 (noting that the first Pre-Trial Chamber decision that offered a definition of gravity was overturned by the Appeals Chamber); Stephen Eliot Smith, *Inventing the Laws of Gravity: The ICC's Initial Lubanga Decision and its Regressive Consequences*, 8 INT'L CRIM. L. REV. 331 (2008) (arguing that the Pre-Trial Chamber's first decision on the meaning of gravity was misguided); SáCouto & Cleary, *supra* note 33 (same).

62. See deGuzman, *supra* note 25, at 1425–28.

63. See *Prosecutor v. Abu Garda*, ICC-02/05-02/09-243-Red, Decision on the Confirmation of Charges, ¶ 31 (Feb. 8, 2010).

64. See *Situation in the Republic of Kenya*, ICC-01/09-19-Corr, Decision Pursuant to Article 15 of the Rome Statute on Authorization of an Investigation into the Situation in the Republic of Kenya, ¶ 188 (Mar. 31, 2010); *Situation in the Republic of Cote d'Ivoire*, ICC-02/11-14-Corr, Corrigendum to Decision Pursuant to Article 15 on the Authorisation of an Investigation into the Situation in the Republic of Cote d'Ivoire, ¶ 204 (Nov. 15, 2011); *Situation on the Registered Vessels of the Union of the Comoros, The Hellenic Republic and the Kingdom of Cambodia*, ICC-01/13-34, Decision on the request of the Union of the Comoros to review the Prosecutor's decision not to initiate an investigation, ¶ 21 (July 16, 2015).

65. See *Situation on the Registered Vessels of the Union of the Comoros, The Hellenic Republic and the Kingdom of Cambodia*, *supra* note 64. Judge Peter Kovacs, in dissent, criticizes the way in which the majority applied the gravity factors. *Id.* at Annex.

66. See *Prosecutor v. Abu Garda*, *supra* note 63, ¶ 31 n.57.

reasoning boils down to “agree[ing] with the Prosecution” that “several factors may be taken into account in the assessment of the gravity of a case.”⁶⁷ It then adopted the Prosecution’s proposed definition.⁶⁸ There is no discussion of why these are the appropriate factors or whether the Chamber considered other definitions before adopting the Prosecution’s definition. The later decisions simply restate the four factor test without debate. The only authority they offer for this definition is a citation to the Pre-Trial Chamber decision in *Abu Garda*.⁶⁹ There is little evidence that the Pre-Trial Chambers have given much thought to how to define gravity or whether the Prosecution’s preferred definition is the best one available. Ultimately, the court’s decisions on gravity support the OTP’s definition, but the lack of reasoning means they provide only weak support.

4. *Scholarship on Gravity*

Turning now to the scholarship, a number of international criminal law scholars have analyzed the gravity requirement in the Rome Statute.⁷⁰ The most thorough of these articles is written by Professor deGuzman. She proposes that gravity be measured by six factors, four of which are the same factors that the OTP and the Pre-Trial Chambers have adopted.⁷¹ Her two additional factors relate to the role and intent of the perpetrator.⁷² While Professor deGuzman is correct that a focus on the role and intent of the perpetrator is necessary to assess the gravity of a particular case brought to trial at the ICC, these factors are less relevant to determining the overall gravity of a situation that the ICC is investigating.⁷³ Since this Article is concerned with assessing the gravity of situations rather than assessing the charges against particular accused persons, factors related to

67. *Id.* ¶ 31.

68. *Id.*

69. See Situation in the Republic of Cote d’Ivoire, *supra* note 64, ¶ 204; Situation on the Registered Vessels of the Union of the Comoros, The Hellenic Republic and the Kingdom of Cambodia, *supra* note 64, ¶ 21.

70. See deGuzman, *supra* note 25; SáCouto & Cleary, *supra* note 33; Smith, *supra* note 61; Stegmiller, *supra* note 39.

71. See deGuzman, *supra* note 25, at 1449–56.

72. *Id.* at 1454–56.

73. *Id.* at 1451 (arguing that factors relevant to the perpetrators must be considered when the gravity of particular charged crimes are determined under Article 17 of the Rome Statute, but acknowledging that “when such determinations relate to *situations*, the perpetrator-related factors will often be irrelevant since the likely perpetrators may not yet be known”). See also Stegmiller, *supra* note 39, at 563 (distinguishing between the concept of “gravity of the crime” which refers to the severity of the offence and “gravity of the case” which refers to the specifics of particular charges against an individual and “might be broader, including the circumstances of the individual”).

particular perpetrators will not be used to assess gravity in this Article. Ultimately, Professor deGuzman essentially agrees with the OTP that gravity of situations should be measured by the scale, nature, manner of commission, and impact of the crimes.⁷⁴

Professor deGuzman also offers some proposals about how to assess these four factors. She suggests that the scale of the crimes should focus on the number of victims as well as the geographic and temporal scope of the violence.⁷⁵ The nature of the harm should focus on the relative seriousness of different acts. In this regard, she argues that there is a hierarchy of criminal acts, with murder being the most serious, crimes of sexual violence being almost as serious as murder, and crimes that involve serious physical or psychological suffering—like torture—being lower on the scale.⁷⁶ Property crimes will generally rank as the least serious form of criminality.⁷⁷

According to Professor deGuzman, the manner of commission factor should focus on factors such as the systematic nature of the crimes, whether they are the result of a plan or policy, whether they involve particular cruelty,⁷⁸ and whether the victims are members of vulnerable groups like women, children or the elderly.⁷⁹ Finally, she argues that the “impact of the crimes” factor should focus on whether the crimes have an effect on society beyond the effect on immediate victims.⁸⁰ For example, she notes that attacks on humanitarian workers could have an impact on many people beyond the workers themselves because of the possibility that the attacks will disrupt the delivery of crucial aid.⁸¹ It is striking how similar this analysis is to the OTP’s explanation of the gravity factors in its 2013 Policy Paper on Preliminary Examinations.⁸² Indeed, it seems possible that the OTP’s definition of gravity was influenced by Professor deGuzman’s article, although her article is not cited in the Policy Paper on Preliminary Examinations.

74. See deGuzman, *supra* note 25, at 1451–54.

75. *Id.* at 1451–52.

76. *Id.* at 1452.

77. *Id.*

78. As an example of particular cruelty, Professor deGuzman suggests that “deliberately slow killing” would qualify as a “particularly heinous way” to commit murder. *Id.* at 1453.

79. *Id.* at 1453.

80. *Id.* at 1453–54.

81. *Id.*

82. See *supra* text accompanying notes 40–45.

Dr. Stegmiller also broadly agrees with the OTP's four factor approach to gravity.⁸³ He does question whether the fourth factor (impact) is an appropriate consideration,⁸⁴ but he is willing to accept impact as a gravity factor if it relates to the impact on the victims rather than the impact on non-victims.⁸⁵ In this regard, he disagrees with Professor deGuzman, who would consider the impact on non-victims as a component of gravity.⁸⁶ Dr. Stegmiller also recommended that the OTP flesh out what it meant by scale, nature, manner of commission, and impact,⁸⁷ which it subsequently did.⁸⁸

Professors SáCouto and Cleary have also weighed in on the meaning of gravity. In their article, they argue that the OTP should be flexible in determining which factors to consider in particular situations.⁸⁹ But they also recommend that the OTP consider factors like the scale and "systematicity" of the crimes, the impact of the crimes on the victims, the manner in which the crimes were carried out, and the vulnerability of the victims.⁹⁰ They base these recommendations, in part, on the factors that the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) used in assessing the gravity of the accused's crimes at sentencing.⁹¹ While Professors SáCouto and Cleary do not use exactly the same terminology as the OTP, there is substantial overlap between their recommendations and the definition the OTP ultimately adopted.⁹²

Ultimately, the scholars who have considered how the OTP should define gravity have made recommendations that are largely consistent with the definition the OTP adopted.⁹³ Of course, there is some disagreement among the academics, but there is also a high level of agreement.⁹⁴ Thus, the international criminal law scholarship supports the OTP's definition.

83. See Stegmiller, *supra* note 39, at 560–61.

84. *Id.* at 560 ("In my view, broader impact clearly belongs to other potential considerations under the 'interests of justice' clause.").

85. *Id.* at 561 ("If the Prosecutor thereby refers to the narrower impact on victims, an inclusion into the gravity criterion could be approved.").

86. See *supra* text accompanying notes 80–81.

87. See Stegmiller, *supra* note 83, at 564.

88. See *supra* text accompanying notes 40–47.

89. SáCouto & Cleary, *supra* note 33, at 843.

90. *Id.*

91. *Id.* at 840–42.

92. See *supra* text accompanying notes 38–47.

93. See *supra* text accompanying notes 70–92.

94. See *supra* text accompanying notes 85–87.

5. *Crime Severity Studies*

A final way to evaluate the OTP's definition is to look at gravity definitions that are unrelated to the ICC. One body of work that addresses the seriousness of crimes in a completely different context is the field of crime severity studies. This is a growing body of literature that studies how people perceive the severity of different crimes, although it has focused exclusively on domestic crimes so far. This section will use the results of empirical studies of crime severity to assess the OTP's definition.

An important question in the field has been whether crime severity can or should be studied empirically.⁹⁵ Some authors have argued that evaluating crime gravity should not be an objective process.⁹⁶ On the other hand, other writers have argued that crime gravity can and should be evaluated empirically.⁹⁷ The empirical approach to crime severity is founded on the premise that if there is some basic agreement about the relative gravity of different crimes that most people share, then it should be possible to create a gravity measure that would be widely accepted as accurate.⁹⁸ And indeed, there is "wide general agreement and stability across different social sectors and populations groups with regard to the relative seriousness of behaviors considered to be criminal."⁹⁹ This

95. See Paul H. Robinson & Robert Kurzban, *Concordance and Conflict in Intuitions of Justice*, 91 MINN. L. REV. 1829, 1830–31 (2007) (noting that while discussions of crime seriousness have historically been based on "a philosophical concept of justice, drawn from the reasoned analysis of moral philosophers" there has been recent interest in an "empirical conception" which could be "subject to empirical testing").

96. See deGuzman, *supra* note 25, at 1401–02 (noting the difficulty of ranking or quantifying human suffering). Cf. ANDREW VON HIRSCH, PAST OR FUTURE CRIMES: DESERVEDNESS AND DANGEROUSNESS IN THE SENTENCING OF CRIMINALS 76 (1985) ("Rating crimes is ultimately a matter of making value judgments, on which persons reasonably may differ."); Michael Tonry, *Obsolescence and Immanence in Penal Theory and Policy*, 105 COLUM. L. REV. 1233, 1263–64 (2005) (arguing that it is not desirable to create an empirical measure of crime gravity).

97. See generally Robinson & Kurzban, *supra* note 95. See also Jeffrey Bellin, *Crime Severity Distinctions and the Fourth Amendment: Reassessing Reasonableness in a Changing World*, 97 IOWA L. REV. 1, 26 (2011) (arguing that courts should not be permitted to define crime severity entirely subjectively).

98. See Paul H. Robinson et al., *The Origins of Shared Intuitions of Justice*, 60 VAND. L. REV. 1633, 1635–36 (2007) (noting that creating a ranking of crime gravity that will be broadly accepted depends on there being general agreement about what makes one crime more serious than another). See also Bellin, *supra* note 97, at 26–29 (arguing that "[g]uideposts must be erected to ensure predictability . . . [and] create consistency . . .").

99. See Sergio Herzog, *The Relationship Between Public Perceptions of Crime Seriousness and Support for Plea-Bargaining Practices in Israel: A Factorial-Survey Approach*, 94 CRIM. L. & CRIMINOLOGY 103, 107 (2003). See also Robinson & Kurzban, *supra* note 95, at 1854–55 (2007) (noting that there is "broad consensus regarding the relative seriousness of different wrongdoings" and

agreement holds true not just within countries but also across different countries.¹⁰⁰ Thus, it should be possible to create a measure of gravity that incorporates criteria that are generally understood to be associated with crime severity and which produces an assessment of relative gravity that most people would agree with.¹⁰¹

Unfortunately, the existing studies of crime gravity focus on the kinds of crimes that occur most frequently in domestic settings.¹⁰² For example, in one such study by Professors Robinson and Kurzban, the study participants were asked to rank twenty-four potential crimes.¹⁰³ The crimes ranged in seriousness and included such things as “theft by taking, theft by fraud, property destruction, assault, burglary, robbery, kidnapping, rape, negligent homicide, manslaughter, murder and torture”¹⁰⁴ The crime that was consistently ranked as the most grave included the rape, torture, and subsequent murder of a child.¹⁰⁵ This is consistent with most surveys of crime severity, which find that violent crimes, particularly those that lead to death or serious injury, are consistently viewed as the most serious.¹⁰⁶ But as awful as this crime is, it pales in comparison to the crimes that are typically investigated by the ICC.¹⁰⁷ Thus, the existing crime severity literature sheds little light on which of the following crimes

that this consensus exists across “a variety of issues and demographics”); *Id.* at 1855–59 (summarizing the results of numerous studies that have shown broad agreement about the relative gravity of different crimes).

100. See Robinson et al., *supra* note 98, at 1637 (noting that there is widespread agreement about how to rank the seriousness of crimes both across different demographic groups within countries and between individuals from different countries); Robinson & Kurzban, *supra* note 95, at 1862–65 (2007) (describing how the results on crime severity first obtained in the United States have been replicated by studies in many other countries).

101. Cf. Bellin, *supra* note 97, at 25–31 (arguing that it is possible to create a framework for understanding the gravity of crimes that is basically objective in nature).

102. See, e.g., Robinson & Kurzban, *supra* note 95, at 1867 n.172 (noting that the authors chose their scenarios because they covered the sorts of crimes most often committed in the United States).

103. *Id.* at 1867.

104. *Id.* The complete text of the crimes is included in Robinson and Kurzban’s article at Appendix A.

105. Scenario 24 was the one that almost everybody in their study ranked as the most serious. *Id.* at 1869. The complete text of Scenario 24 was: “John kidnaps an 8 year-old girl for ransom, rapes her, then records the child’s screams as he burns her with a cigarette lighter, sending the recording to her parents to induce them to pay his ransom demand. Even though they pay as directed, John strangles the child to death to avoid leaving a witness.” *Id.* at 1898.

106. See Herzog, *supra* note 99, at 107. See also Stuart P. Green, *Why It’s A Crime to Tear the Tag Off a Mattress: Overcriminalization and the Moral Content of Regulatory Offenses*, 46 EMORY L.J. 1533, 1564–65 (1997) (noting that in many surveys of crime severity, the most serious crimes included things like planting a bomb in a public building that explodes killing twenty people, beating a young child to death, the deliberate killing of a person for a fee, and the forcible rape of a neighbor).

107. See *infra* Part III.B (describing the average ICC investigation).

people would view as more grave: 500 murders; 1,000 rapes; or forcing 100,000 people to flee their homes. As a result, that literature cannot easily be used to create a gravity measure that would apply directly to the crimes typically investigated by the ICC.

Nevertheless, the OTP's approach is consistent with the existing literature on crime severity because it focuses on factors like the number of victims, the specific harm the victims suffered, the type of victim, and the manner in which the crimes were carried out.¹⁰⁸ These are all factors that have been found to be important to individuals' assessment of crime gravity. For example, in *The National Survey of Crime Severity*, participants rated a number of different variations on a person planting a bomb in a public building. The severity of the crime increased as the number of victims increased.¹⁰⁹ *The National Survey of Crime Severity* also found that killings were generally more serious than rapes, which were more serious than the infliction of physical injury, which was itself more serious than property crimes.¹¹⁰ The identity of the victim also matters, with crimes against children generally being viewed as more serious than the same crime against an adult.¹¹¹ Finally, the manner in which the crime was carried out mattered, even when the harm was held constant.¹¹² Taken together, these findings suggest that the OTP's gravity definition is appropriate because it focuses on many of the same factors that empirical studies of crime severity have found to be indicators of gravity.

There is definitely room, however, for empirical studies of crime severity that focus on the kinds of crimes (and the kinds of crime participation) that occur most frequently in serious violations of international criminal law.¹¹³ Such a study might indicate a better way to

108. See *supra* text accompanying notes 38–45.

109. See MARVIN E. WOLFGANG ET AL., *THE NATIONAL SURVEY OF CRIME SEVERITY* (June 1985) at vi (“[The] consequences strongly affect the ratings, a fact that is repeatedly apparent when similar crimes with different outcomes are examined. For example, the items scored 72.1, 43.9, 33.0, and 24.5 are all the same, planting a bomb that goes off in a public building. The outcomes range from 20 people killed to no one injured, and the scores descend in seriousness reflecting the differing outcomes.”).

110. This can be seen quite clearly from the rank ordering of the crimes. *Id.* at vi–x. The crimes that were ranked as most serious involved the death of a victim. Rape appears on the list after the crimes involving the death of the victim and before the crimes that involved physical injury to the victim. The crimes that were ranked as least serious involved damage to or theft of property. *Id.*

111. *Id.* at vi. See also *id.* at 47.

112. See *id.* at 28, tbl.18 (noting that a crime carried out with a gun was ranked as more severe than the same crime carried out with a lead pipe, which was itself ranked as more severe than the same crime carried out without any weapon).

113. For example, Professor deGuzman suggests that there is no easy way to measure the gravity

create a measure of gravity that would be tailored to the kinds of crimes that are usually investigated and prosecuted at the ICC. But in the meantime, the OTP's gravity definition is consistent with the results of empirical crime severity studies.

B. Measuring the Gravity of Mass Atrocities

The OTP's definition of gravity is a reasonable basis for a gravity measure. First, the Rome Statute does not contain a definition of gravity and the drafting history does not suggest one either.¹¹⁴ Second, the OTP's definition is consistent with the definition that has been adopted by the Pre-Trial Chambers, although it is not clear how much effort the Pre-Trial Chamber has put into defining gravity.¹¹⁵ Third, the scholars who have considered how the OTP should define gravity have made recommendations that are consistent with the definition the OTP ultimately adopted.¹¹⁶ Of course, there is some disagreement among the academics, but there is more agreement than disagreement.¹¹⁷ The OTP's approach also appears to be generally consistent with how other international criminal courts have defined gravity, albeit in the somewhat different context of sentencing decisions.¹¹⁸ Finally, the OTP's definition is consistent with empirical studies of crime severity. Taken together, this suggests that the OTP's gravity definition is an appropriate one. Thus, this Article's gravity measure is based on the OTP's explanation of gravity in its 2013 Policy Paper on Preliminary Examinations.¹¹⁹

The next problem becomes how to convert the OTP's definition into a measure that can be used to compare the gravity of crimes committed in different settings. As the OTP has noted, some of the factors it considers can be reduced to quantitative measures, most notably the number of victims. But gravity is not solely a function of these quantitative components and also is comprised of some qualitative components. The

of international crimes and that reasonable people can differ in their gravity determinations. She seems to suggest that there is no way to create a broadly-accepted measure of gravity. *See deGuzman, supra* note 12, at 288 (arguing that determinations of "[s]eriousness of harm" are individualized and "incommensurable"). Given the findings of domestic crime severity surveys, it seems likely that Professor deGuzman is wrong and that there is some agreement about how to rank the most serious crimes, but we will not know where the areas of agreement are until the issue is studied empirically.

114. *See supra* text accompanying notes 50–58.

115. *See supra* text accompanying notes 61–69.

116. *See supra* text accompanying notes 70–92.

117. *See supra* text accompanying notes 85–87.

118. SáCouto & Cleary, *supra* note 33, at 840–42 (2007).

119. *See supra* text accompanying notes 40–45.

factors that make up this Article's gravity measure were chosen so that they would capture as much of the OTP's definition as possible, both the quantitative and qualitative components.

The gravity measure used in this Article is comprised of eight factors: (1) the number of crime sites¹²⁰ included in the investigation; (2) the amount of time over which the crimes occurred; (3) the structure and organization of the alleged perpetrator groups; (4) the identity of the victims, particularly whether the victims were civilians and whether women or children were targeted; (5) the number of the victims, including the particular number of victims who were killed, raped, wounded, or displaced; (6) the use of exceptionally cruel or brutal means of conducting the crimes; (7) whether the crimes were carried out with a discriminatory motive; and (8) the legal qualification of the crimes (i.e., whether the ICC is treating the crimes as war crimes, crimes against humanity, or genocide). Taken together, these eight factors permit the seriousness of different mass atrocity crimes to be meaningfully compared to one another.¹²¹

These factors were chosen because they shed light on the scale, nature, manner of commission and impact of the crimes. The first factor, the number of crime sites, indicates the number of places at which crimes have occurred. It thus measures the geographic scope of the crimes, a component of the scale of the crimes.¹²² The second factor, the amount of time over which the crimes occurred, relates to the temporal scope of the crimes and is also a component of the scale of the crimes.¹²³ As the geographic and temporal scope of the crime increases, its gravity increases.

The third factor, the structure and organization of the perpetrator groups, is related to the manner in which the crimes are committed.¹²⁴ Systematic crimes are more likely to be committed by hierarchically-organized groups because the hierarchical nature of such organizations

120. A crime site is a location where the prosecution believes a crime (or part of a crime) within the jurisdiction of the court may have occurred. See Stuart Ford, *The Complexity of International Criminal Trials Is Necessary*, 48 GEO. WASH. INT'L L. REV. 151, 161 (2015).

121. Cf. Robinson & Kurzban, *supra* note 95, at 1854–55 (noting that while people do not always agree on the absolute seriousness of different crimes, there is much more agreement on the relative seriousness of different crimes). This means that, while it may not be possible to make an absolute determination of the seriousness of different mass atrocity crimes, it ought to be possible to make relative determinations of the seriousness of these crimes such that they can be compared to one another. *Id.* at n.114.

122. See *supra* text accompanying note 40.

123. *Id.*

124. See *supra* text accompanying note 43.

makes it much easier to implement them. And indeed, the majority of serious international crimes are carried out by hierarchically-organized groups.¹²⁵ Thus, the structure and organization of the perpetrator groups can act as a proxy for the systematic nature of the crimes, and crimes that are committed systematically or pursuant to an organized policy are more grave.¹²⁶

The fourth factor focuses on the identity of the victims, particularly whether the victims are civilian and whether they are women or children. This factor goes to the manner of the commission of the crimes, including whether they were directed at vulnerable victims.¹²⁷ Civilians, particularly women and children, are vulnerable victims and targeting them increases the gravity of the crime.

The fifth factor focuses on the number of victims who suffered particular harms, including death, rape, serious injury, and displacement. This factor contributes to the scale of the crimes¹²⁸ and their nature.¹²⁹ It can also serve as a measure of the impact of the crimes because it indicates both the magnitude of the suffering of the victims and the likely impact of the crimes on the victims' communities.¹³⁰ As the number of victims increases the gravity of the crime increases too. Similarly, as the particular harms become more serious, the gravity of the overall crime increases.

The sixth factor, the use of cruel or brutal means of committing the crimes, is relevant to the manner of the commission of the crimes.¹³¹ Crimes that exhibit particular cruelty or brutality are more grave. Similarly, the seventh factor, the presence of a discriminatory motive, also goes to the manner of commission.¹³² Crimes that are carried out with a discriminatory motive are also more grave.

Finally, the eighth factor, the legal qualification of the crimes, can shed light on the intent of the perpetrators, a factor in the assessment of the manner in which the crimes were carried out.¹³³ This is true because one

125. *See infra* text accompanying note 153.

126. *Policy Paper on Preliminary Examinations*, *supra* note 38, ¶ 64 (noting that crimes are more grave if they are “systematic” or “result from a plan or organized policy”).

127. *See supra* text accompanying note 43.

128. Office of the Prosecutor, *supra* note 38, ¶ 62 (noting that the number of victims is a component of the scale of the crimes).

129. *Id.* ¶ 63 (noting that the types of wrongful acts committed are a component of the nature of the crimes).

130. *Id.* ¶ 65.

131. *Id.* ¶ 64.

132. *Id.*

133. *Id.* (noting that the manner of commission can be assessed by, among other things, the “intent of the perpetrator” and “any motives involving discrimination”).

of the crimes—genocide—requires a discriminatory motive.¹³⁴ It can also shed light on the impact of the crimes because genocide requires that the perpetrators intend to “destroy, in whole or in part,” a protected group.¹³⁵ The requirement of an attempt to destroy a protected group implies a large impact on the victim group. These eight factors serve as the basis for this Article’s assessment of the relative gravity of both the crimes investigated by the ICC and the most serious mass atrocity crimes investigated in domestic systems.

C. Gravity and the Difficulty of Criminal Investigations

In addition to measuring the gravity of the crimes, these factors serve another function in this Article. As shown below, the resources necessary for a successful investigation generally increase as the gravity of the crimes being investigated increases.¹³⁶ Thus, the gravity factors both indicate the difficulty of investigating the alleged crimes and act as a proxy for the investigative resources necessary to successfully complete an investigation.¹³⁷

The goal of every criminal investigation is to identify and collect evidence sufficient to establish whether a crime has been committed and, if so, identify who is legally responsible for that crime.¹³⁸ No criminal trial

134. See Rome Statute, *supra* note 28, art. 6 (noting that the crime of genocide requires that the physical elements be carried out with the “intent to destroy, in whole or in part, a national, ethnical, racial or religious group as such”).

135. *Id.*

136. See *infra* text accompanying notes 138–56. The following discussion on the factors affecting the difficulty of international criminal investigations is rooted partly in literature, which is cited throughout. However, it is also based on the Author’s personal experience. The Author was an Assistant Prosecutor at the Extraordinary Chambers in the Courts of Cambodia (ECCC). One of his primary duties was overseeing the preliminary investigations related to the “crime base.” He worked with analysts and investigators to decide which crime sites to investigate, oversaw the work of investigators carrying out the investigations, led a team of analysts who coded the results of the investigations and entered that data into a database, provided legal advice on the sufficiency of the collected information, and drafted the portions of the first Introductory Submission relating to the crime base. His experience at the ECCC informs the discussion of the relationship between gravity and investigative difficulty.

137. For purposes of this Article, an investigation is successful if all relevant leads are investigated and all relevant information is collected. Success is not determined by whether the investigation permits charges to be filed but rather by whether the investigation collects the information necessary for the prosecutors to decide with confidence whether or not to bring charges. See *infra* text accompanying notes 138–39.

138. See Dermot Groome, *No Witness, No Case: An Assessment of the Conduct and Quality of ICC Investigations*, 3 PENN ST. J.L. & INT’L AFF. 1, 3 (2014) (“Credible and reliable evidence is the foundation of a criminal case; it underlies each and every aspect of the case that follows an arrest.

can proceed without that evidence.¹³⁹ If the purpose of the investigation is to collect the evidence necessary to establish whether a particular crime has occurred, it stands to reason that the larger the gravity of the suspected crimes, the more resources will be necessary to conduct an investigation.

For example, evidence must be collected about each crime site that is part of the investigation. The site must be identified, what occurred there must be discovered and documented, and the connection between the crime site and the rest of the investigation must be explored.¹⁴⁰ In effect, each crime site that is part of the investigation represents a commitment to the expenditure of investigative resources. Therefore, the more crime sites that are included in the investigation, the more resources will be needed to conduct the investigation. Thus, the data on the number of crime sites included in each of the ICC's investigations acts as an indicator of the resources necessary to carry out that investigation.

It also stands to reason that as the number of victims increases, additional investigative resources will be needed. Of course, the needed resources do not necessarily scale linearly with the number of victims.¹⁴¹ Nevertheless, it is probably true that the resources needed to investigate mass atrocity crimes generally increase as the number of victims increases.¹⁴² Thus, the number of victims of the crimes being investigated can affect the necessary investigative resources.

The legal qualification of the crimes can also impact the required investigative resources. The two most commonly investigated international crimes—crimes against humanity and war crimes—have jurisdictional requirements that must be proved.¹⁴³ War crimes must take place during an armed conflict.¹⁴⁴ Crimes against humanity must take place as part of a widespread or systematic attack upon a civilian

Without it, there is no viable case. The goal of a criminal investigation is to identify and collect evidence.”).

139. *Id.*; Mark B. Harmon & Fergal Gaynor, *Prosecuting Massive Crimes with Primitive Tools: Three Difficulties Encountered by Prosecutors in International Criminal Proceedings*, 2 J. INT’L CRIM. JUST. 403, 403 (2004) (“No indictment can be issued, and no trial can take place, without evidence.”).

140. *See* Ford, *supra* note 120, at 161.

141. A crime with 500 victims requires significantly more resources than a murder case with a single victim, but it will probably not need 500 times as many resources. Similarly, a crime with 1,000 victims is not necessarily twice as difficult to investigate as a crime with 500 victims.

142. *Cf.* Ford, *supra* note 120, at 165.

143. *See infra* Table 1 (showing that crimes against humanity and war crimes are the two most investigated crimes at the ICC).

144. *See* Rome Statute, *supra* note 28, art. 8.

population.¹⁴⁵ Proving these jurisdictional requirements takes investigative resources. For example, establishing that an armed conflict existed requires collecting evidence about the length and intensity of the fighting as well as evidence about the structure and organization of the groups participating in the violence.¹⁴⁶ Proving that a murder constitutes a crime against humanity requires proving that it “was committed as part of a widespread or systematic attack directed against a civilian population.”¹⁴⁷ Therefore, the investigators must conduct additional investigative work to establish that a widespread or systematic attack was occurring at the time and that the particular crime being investigated was committed as part of that attack. Thus, collecting data on the legal qualification of the crimes under investigation can shed light on the investigative resources that must be devoted to establishing the jurisdictional requirements of the various crimes.

Significant resources must also be devoted to identifying who is legally responsible for the crimes that are uncovered.¹⁴⁸ A distinction is often made in international criminal investigations between the “crime base” evidence and the “linking” or “linkage” evidence.¹⁴⁹ The crime base evidence demonstrates that crimes within the jurisdiction of the court have been committed.¹⁵⁰ This evidence arises largely from the investigation of the individual crime sites.¹⁵¹ While the investigation of the crime base may identify some low-level direct perpetrators, further investigation is almost always required.¹⁵² Most international crimes are committed by

145. *Id.* art. 7(1).

146. *See infra* notes 185, 186 (discussing the legal elements of proving the existence of an armed conflict).

147. Elements of Crimes, art. 7(1)(a), ICC Doc. No. ICC-ASP/1/3 (Sept. 9, 2002).

148. While one of the key goals of a criminal trial is to establish that crimes have occurred, crimes are committed by people. Another key purpose of a criminal trial is to establish which individuals bear criminal responsibility for the crimes that have been committed. *See, e.g.*, Rome Statute, *supra* note 28, art. 25(2) (“A person who commits a crime within the jurisdiction of the Court shall be individually responsible and liable for punishment in accordance with this Statute.”).

149. *See Ford, supra* note 120, at 159 (describing linking evidence).

150. *See Investigations*, ICTY.ORG, <http://www.icty.org/en/about/office-of-the-prosecutor/investigations> (noting that the ICTY worked from the “bottom” upwards and began with the crime base evidence which identified what crimes had occurred and the “lower-ranking persons who actually committed” those crimes).

151. *Id.* (noting that investigators typically begin their investigation by interviewing witnesses, then visit the crime site to corroborate the statements as well as photograph the site and collect physical evidence).

152. *See Minna Schrag, Lessons Learned from the ICTY Experience*, 2 J. INT’L CRIM. J. 427, 430 (2004) (noting that the initial investigations at the ICTY turned up “a great deal of information about low and middle-level detention camp officials” but that it took considerable additional effort to obtain the information necessary to begin indicting those higher up in the hierarchy, “[e]ven though there was

hierarchically organized groups working together.¹⁵³ Thus, the investigators must also investigate whether any high-level indirect perpetrators participated in the crimes.¹⁵⁴ This aspect of the investigation focuses on the “linking” evidence—i.e., the evidence that links the crime base to higher-level perpetrators.¹⁵⁵ Establishing that individuals who may be geographically or organizationally removed from the crimes are legally responsible for them is one of most difficult aspects of international criminal prosecutions.¹⁵⁶ Moreover, the larger and more complicated the organizational structure of the perpetrator groups, the more difficult this process becomes.¹⁵⁷ As a result, establishing individual criminal responsibility for crimes committed by large hierarchically organized groups is both very difficult to prove in court but also very difficult to investigate. Thus, the data collected on the structure and organization of the perpetrator groups can shed light on the resources necessary to investigate them.

For these reasons, the factors used to assess the gravity of the alleged crimes should act as a reasonable proxy for the difficulty of investigating those crimes and the investigative resources necessary to successfully complete such an investigation.

a general understanding among many of the OTP senior staff that the focus should be on the most important perpetrators”). See also *Investigations*, ICTY.ORG, <http://www.icty.org/en/about/office-of-the-prosecutor/investigations> (noting that the testimony of victims provided “invaluable crime base evidence and links to the persons who had physically committed the crimes, such as soldiers, camp guards and wardens” but that “the challenge was to link the crime base incidents with persons who did not physically commit the crime but who may have ordered, planned, implemented or facilitated” them).

153. See Stuart Ford, *Fairness and Politics at the ICTY: Evidence from the Indictments*, 39 N. CAROLINA J. INT’L L. & COMM. REG. 45, 67–68 (2013).

154. See Groome, *supra* note 138, at 7 (“Often central to an international criminal investigation is the question of whether senior officials participated in the crime.”).

155. *Id.* (noting that cases involving senior officials “require investigators to perform the additional task of investigating and determining which officials within the chain of command structure bear responsibility.”).

156. See Ford, *supra* note 120, § VII(A) (arguing that the difficulty of attributing responsibility for crimes to high-level indirect perpetrators who are often geographically and organizationally distant from the crimes is the principal cause of the complexity of international criminal trials). See also *Investigations*, INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA, <http://www.icty.org/en/about/office-of-the-prosecutor/investigations> (noting that “legally linking the persons higher up to the actual crimes committed is not easy and takes time” and that this process took “took several years of work by many dedicated present and former members of the OTP”); Mirjan Damaška, *What is the Point of International Criminal Justice?*, 83 CHI.-KENT L. REV. 329, 348 (2008) (noting the difficulty of proving the criminal responsibility of “high-ranking officials who are remote from the immediate perpetrators”).

157. See Ford, *supra* note 120, at 183.

III. THE GRAVITY OF INTERNATIONAL AND DOMESTIC CRIMINAL INVESTIGATIONS

This part will assess the gravity of the ICC's investigations and compare them to the gravity of a selection of domestic mass atrocity investigations.

A. *The Gravity of the ICC's Investigations*

As of July 2015, the ICC had begun or completed investigations in nine situations¹⁵⁸: The Democratic Republic of Congo (DRC), Darfur, Côte d'Ivoire, Kenya, Mali, Libya, Central African Republic (CAR) I, CAR II,¹⁵⁹ and Uganda.¹⁶⁰ Each investigation will be summarized briefly below. The summaries focus on the gravity factors listed above.¹⁶¹ They are based on the publicly available information about the investigations. In some cases, however, that information is incomplete.¹⁶²

It is also important to note that the information collected below relates to the scope of the OTP's investigation, not the overall scale of the atrocities committed. The OTP rarely, if ever, investigates every atrocity committed in a particular conflict. For example, several hundred thousand people have died in the conflict in Darfur in the years since it began,¹⁶³ but

158. The term "situation" has a special meaning at the ICC. According to Article 13 of the Rome Statute, the ICC may exercise jurisdiction over "[a] situation in which one or more [of the crimes described in Article 5 of the Statute] appears to have been committed." See Rome Statute, *supra* note 28, art. 13. A situation is usually defined temporally and territorially. See WILLIAM A. SCHABAS, *THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY ON THE ROME STATUTE* 298–99 (Oxford University Press 2010). Thus, a situation is a temporally and territorially defined space within which one or more crimes within the jurisdiction of the court may have been committed.

159. In 2014, the OTP opened a second investigation into crimes committed in the Central African Republic, but this investigation (CAR II) covers crimes committed from 2012 onwards and is separate from the investigation in CAR I, which covered crimes that took place in 2002 and 2003. See *infra* Parts III.A.7 and III.A.8.

160. See *Situations Under Investigation*, INTERNATIONAL CRIMINAL COURT, http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/Pages/situations%20and%20cases.aspx (last visited July 21, 2015). This list was accurate as of July 2015, when the data for this Article was collected. There were, however, a number of preliminary examinations ongoing at that time and it is possible (perhaps even likely) that additional investigations will have been initiated by the time this Article is published.

161. See *supra* text accompanying notes 119–21.

162. For example, the information on the situation in Uganda is incomplete because much of the relevant information was filed under seal. See *infra* Part III.A.9.

163. See *Darfur deaths 'could be 300,000'*, BBC NEWS (Apr. 23, 2008, 9:38 AM), <http://news.bbc.co.uk/2/hi/africa/7361979.stm> (noting that while the government of Sudan estimated that there had been 10,000 deaths, the World Health Organization had estimated that more than 200,000 people had died in Darfur).

the OTP's investigation focuses on only a subset of the deaths.¹⁶⁴ The goal of the OTP when deciding on the scope of the investigation is to select a sample of incidents that are representative of the gravest acts and the main types of victimization.¹⁶⁵ This prioritization is necessitated by the Court's limited resources.¹⁶⁶ As a result, the OTP's investigations usually cover just a small portion of the atrocities committed in any given situation.

1. *The DRC*¹⁶⁷

The OTP's investigation arising out of the situation in the DRC covered two different armed conflicts that took place years apart. Moreover, the investigation covered a period of slightly more than two years¹⁶⁸ and involved alleged crimes committed by four different armed groups. Each of these armed groups was a sophisticated, hierarchically organized group capable of sustaining significant military operations. The arrest warrants show that the OTP investigated crimes committed at twenty-four different locations.¹⁶⁹ The victims of these attacks were civilians,¹⁷⁰ and the OTP alleges that at least 1,000 civilians were

164. See *infra* Part III.B.2.

165. See Situation in the Republic of Côte D'Ivoire, ICC-02/11-3, Request for authorization of an investigation pursuant to article 15, ¶ 25 (June 23, 2011) (noting that the "incidents referred to in this Application are not exhaustive" and that "[t]he Prosecution selected a limited number of incidents, aiming to provide a sample that is reflective of the gravest incidents and the main types of victimisation"). See also Office of the Prosecutor, *Situation in the Central African Republic II: Article 53(1) Report*, ¶ 95 (Sept. 24, 2014) (noting that the OTP was focusing on the "most serious alleged crimes" and that it had received information on more crimes than were described in its report).

166. See *infra* Part IV.A (describing the limited investigative resources available to the Court).

167. The information in this part is a summary of the more detailed information presented in Section I of Stuart Ford, *The Gravity of ICC Investigations Carried Out Between 2002 and 2015* (Feb. 2016), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2101764.

168. The investigation of the earlier conflict covered the period July 2002 to December 2003, a period of eighteen months. See Ford, *supra* note 167, at 3. The investigation of the later conflict covered the period January to September 2009, a period of nine months. *Id.* at 5. Combined, this represents a period of twenty-seven months, or slightly more than two years.

169. This includes the six training camps described in the Dyilo arrest warrant, *id.* at 3, the six villages described in the Ntaganda arrest warrant, *id.* at 4, the village disclosed in the Katanga arrest warrant, *id.* at 4–5, and the eleven villages listed in the Mbarushimana arrest warrant, *id.* at 5.

170. A civilian is a person who is not a member of the armed forces. See JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW VOLUME 1: RULES 17 (2005), <https://www.icrc.org/eng/assets/files/other/customary-international-humanitarian-law-i-icrc-eng.pdf>. This contrasts civilians with "combatants" who are those persons who are members of the armed forces of a party to the conflict. *Id.* at 11. All persons who are part of an organized armed force, group or unit which acts under the responsible command of a party to the conflict are thus combatants. *Id.* at 14.

murdered,¹⁷¹ thousands of civilians were injured, and at least 140,000 civilians were forcibly displaced. There were also a large but undisclosed number of rapes and instances of sexual slavery, as well as wholesale looting and destruction of property. In many cases, the attacks were carried out by armed groups associated with one ethnic group against members of other ethnic groups for the purpose of consolidating power and territory. Finally, the conflicts in the DRC were marked by the widespread use of child soldiers. These acts were charged as a variety of war crimes and crimes against humanity.

2. *Darfur*¹⁷²

The Darfur investigation involved alleged crimes occurring at more than one hundred crime sites over a period of nearly five years. These crimes took place during an armed conflict between the government of Sudan and various rebel groups. The alleged perpetrators for the vast majority of the crimes were armed forces associated with the government of Sudan, but the OTP also investigated two rebel groups for their involvement in attacks on U.N. peacekeepers.¹⁷³ All of the perpetrators constituted hierarchically organized armed groups. The victims (with the exception of the U.N. peacekeepers) were civilians who were chosen largely because of their ethnicity. It appears that civilians were targeted because the Sudanese government suspected their ethnic groups of supporting the rebels. All told, thousands of civilians were killed, thousands more were raped, and hundreds of thousands were displaced from their homes. In addition, there was widespread torture, looting and destruction of property. The OTP alleged that the Sudanese government's attacks took place with the intent of destroying certain ethnic groups. The crimes were qualified as a variety of crimes against humanity, war crimes, and genocide.

171. This includes the 800 deaths associated with the UPC/FPLC attacks. *See* Ford, *supra* note 167, at 4, and the 200 deaths associated with the FNI and FRPI attack on Bogoro village. *Id.* at 4–5. This is obviously a minimum figure, as the OTP also alleged that the FLDR murdered civilians as part of its attacks, but does not provide an estimate of the number killed. *Id.* at 5.

172. The information in this part is a summary of the more detailed information presented in Section II of Ford, *supra* note 167.

173. Intentionally attacking UN peacekeepers is a violation of the Rome Statute. *See* Rome Statute art. 8(2)(b)(iii).

3. Côte D'Ivoire¹⁷⁴

The OTP's investigation in Côte d'Ivoire involved attacks by two different sophisticated armed groups¹⁷⁵ that took place during an armed conflict. These groups committed attacks at more than forty-five locations¹⁷⁶ throughout the country over a period of approximately five months. These attacks resulted in the deaths of more than a thousand civilians, hundreds of rapes, and more than 500 unlawful and arbitrary detentions. They were also accompanied by an unknown number of instances of beatings, torture, inhumane treatment, and the destruction of property. More than one million civilians were displaced by the violence. The victims of these attacks were civilians and it appears both sides targeted individuals because of their actual or perceived support for the other side of the conflict. These acts were alleged to constitute a variety of war crimes and crimes against humanity.

4. Kenya¹⁷⁷

The Kenya investigation covered attacks by groups associated with two rival political parties that took place in the aftermath of a disputed election. Each group is alleged to have had sufficient organization to carry out premeditated attacks involving large numbers of attackers at multiple locations simultaneously, but they were not alleged to be "armed groups."¹⁷⁸ These attacks took place all over the country over a period of approximately two months, although the investigation apparently focused on fifteen locations. More than 1,100 people were killed, at least 900 were raped, more than 3,500 were seriously injured, and more than 350,000 were displaced from their homes. The victims were largely civilians who were targeted because of their actual or perceived support for a rival

174. The information in this part is a summary of the more detailed information presented in Section III of Ford, *supra* note 167.

175. The pro-Gbagbo forces included the country's army, police and security services as well as some armed militias. See Ford, *supra* note 167, at 7–8. The principal pro-Ouattara group, the Forces Nouvelles, was organized like a conventional army. *Id.* at 9.

176. The ICC intended to investigate at least thirty crime sites associated with the pro-Gbagbo forces and at least seventeen crime sites associated with the pro-Ouattara forces. *Id.* at 9–11.

177. The information in this part is a summary of the more detailed information presented in Section IV of Ford, *supra* note 167.

178. The term "armed group" has a technical meaning in international criminal law and refers to certain groups that participate in armed conflicts. To qualify as an armed group, a group must be organized, operate under a responsible command, and have an internal disciplinary system that enforces compliance with international humanitarian law. See *infra* note 187.

group. The killings were often done in a particularly brutal fashion, with victims being drowned, suffocated, stoned, and hung. Rapes and sexual violence were also often extremely brutal and female victims sometimes had their vaginas and labia cut with sharp objects, while male victims sometimes had their penises amputated. These acts were alleged to constitute a variety of crimes against humanity.

5. *Mali*¹⁷⁹

The Mali investigation will examine attacks by five different groups, including the Malian Armed Forces and four rebel groups, which took place during an armed conflict. Each of these groups is hierarchically organized, with two of them functioning as conventional armies and the other three operating as smaller, but still organized, armed groups with hierarchical command structures. The attacks under investigation took place over a period of approximately five months and occurred at no less than nine separate locations. The victims were either civilians or combatants who were *hors de combat*.¹⁸⁰ The ICC indicated that the violence resulted in between 100 and 200 killings, between 50 and 100 rapes, and the systematic destruction of property and religious buildings. At least some of the killings were particularly cruel and involved mutilating or dismembering the victims. These acts were alleged to be a variety of war crimes.

6. *Libya*¹⁸¹

The OTP's investigation of the situation in Libya focuses on attacks by government forces on peaceful protesters. Over the course of approximately two weeks, Libyan government forces attacked protesters at twenty-six locations. These attacks resulted in the deaths of at least 750

179. The information in this part is a summary of the more detailed information presented in Section V of Ford, *supra* note 167.

180. While it is generally lawful for combatants to attack and kill other active combatants during an armed conflict, once combatants have been rendered "*hors de combat*" (which literally means "outside the fight") by injuries or capture, it is no longer lawful to attack or kill them. *See, e.g.*, Geneva Convention Relative to the Treatment of Prisoners of War art. 3, Aug. 12, 1949, 75 U.N.T.S. 135 (noting that "[p]ersons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed 'hors de combat' by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely" and that violence against them is prohibited). *See also* HENCKAERTS & DOSWALD-BECK, *supra* note 170, at 311.

181. The information in this part is a summary of the more detailed information presented in Section VI of Ford, *supra* note 167.

civilians, injuries to hundreds more, as well as the arrest, torture, and unlawful imprisonment of hundreds. The victims were targeted because of their participation in protests against the government. These attacks are alleged to constitute a variety of crimes against humanity.

7. *CAR I*¹⁸²

The OTP first investigated potential crimes in the Central African Republic that were committed during an armed conflict that took place in 2002 and 2003. This investigation (called CAR I) covered crimes that occurred over a period of approximately six months. The perpetrator is alleged to be a sophisticated, hierarchically organized armed group. The OTP intended to investigate violence that occurred at seven locations. While there were a number of acts of murder and torture, the OTP indicated that its investigation would focus largely on rape and sexual violence, which it alleged to have been a central feature of the conflict. The OTP indicated that there had been at least 600 reported rapes, but that the actual number was probably far higher. The OTP alleged that rape was used as a tool during the conflict, and that the perpetrator groups committed their rapes in particularly brutal fashion, including through the use of gang rapes, the public rape of victims, and by forcing relatives to participate in rapes. The victims were civilians and these acts were alleged to be a variety of war crimes and crimes against humanity.

8. *CAR II*¹⁸³

In 2014, the OTP opened a second investigation (called CAR II) into potential crimes committed in CAR, arising out of a separate armed conflict that occurred during 2012 and 2013. The investigation will focus on two perpetrator groups, both of which are hierarchically organized armed groups. The OTP will investigate at least thirty-three attacks that took place over a period of approximately two years. In the course of these attacks, at least 2,600 civilians were killed, hundreds to thousands of civilians were raped, thousands of homes were destroyed, and more than one million civilians were displaced. The crimes were driven by discriminatory motives and virtually the entire Muslim population of the

182. The information in this part is a summary of the more detailed information presented in Section VII of Ford, *supra* note 167.

183. The information in this part is a summary of the more detailed information presented in Section VIII of Ford, *supra* note 167.

Central African Republic was forced to flee the country as a result of the violence. These crimes were alleged to constitute a variety of crimes against humanity and war crimes. In addition, the OTP indicated it would investigate whether the deliberate targeting of Muslims by one of the perpetrator groups was genocide.

9. *Uganda*¹⁸⁴

Due to redactions in the public record, information about the OTP's investigation in Uganda is incomplete. The OTP investigated the Lord's Resistance Army (LRA), a hierarchically organized armed group that has been carrying out an insurgency in Uganda since at least 1987. The OTP's investigation focused on a series of attacks on villages and internally displaced persons' camps that took place during 2003 and 2004, and were part of the armed conflict between the LRA and the forces of the government of Uganda. There were at least six such attacks that took place over a period of several months to two years. These attacks resulted in the deaths of a large but undisclosed number of civilians, as well as rapes, inhumane acts, and enslavement. The victims were largely civilians, including many women and children. Children, in particular, were deliberately victimized during these attacks, with the LRA abducting large numbers of children to be used as fighters, porters, and sex slaves. The crimes were also committed in a particularly brutal fashion, and the OTP alleges that many of the victims were hacked or bludgeoned to death. These attacks were alleged to be a variety of war crimes and crimes against humanity.

B. *The Typical ICC Investigation*

Many of the key facts related to the gravity of the ICC's investigations are summarized below in Table 1. All the information in this Part comes from the data in Table 1 unless otherwise indicated. It is apparent from the table that there are a number of similarities across the situations investigated by the ICC. First, the alleged crimes in seven of the nine situations took place during an armed conflict.¹⁸⁵ The only two situations

184. The information in this part is a summary of the more detailed information presented in Section IX of Ford, *supra* note 167.

185. Armed conflicts are either international or non-international in character. International armed conflicts occur whenever there is any resort to military force between states. See ROBERT CRYER ET AL., AN INTRODUCTION TO INTERNATIONAL CRIMINAL LAW AND PROCEDURE 279 (2010). Non-international armed conflicts require "sustained and concerted military operations" between states and

the ICC has investigated so far that did not involve an armed conflict were in Kenya and Libya. In the latter two cases, there was extensive political violence directed at civilian populations, but the OTP did not allege that the violence rose to the level of an armed conflict.¹⁸⁶ Nevertheless, widespread organized violence is a hallmark of the ICC's investigations, even when that violence is not categorized as an armed conflict.

Second, and related to the first point, the vast majority of the perpetrators the ICC investigates are members of hierarchically organized armed groups.¹⁸⁷ In eight of the nine investigations, the perpetrators were organized armed groups, including in one situation (Libya) that was not classified as an armed conflict. Even though it was not an armed conflict, the violence in Libya was allegedly perpetrated by the official armed forces of the Libyan government.¹⁸⁸ The only situation where the perpetrators were not members of an organized armed group was Kenya. Nevertheless, even in Kenya, the violence was perpetrated by groups that had sufficient organization and capacity to plan and coordinate large-scale attacks on civilians, even if they did not meet the definition of an armed group under international law.¹⁸⁹

Another facet of the typical ICC investigation is that it involves multiple perpetrator groups. Of the nine situations considered above, in six of them the ICC was investigating more than one perpetrator group. In many cases, this meant investigating alleged crimes committed by both sides in an armed conflict.

"dissident armed forces or other organized groups" which operate under "responsible command." See Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977 art. 1(1). It is generally accepted that this requires protracted armed violence between organized armed groups. See CRYER, *supra* at 283.

186. Armed conflicts require protracted armed violence between organized armed groups. See *supra* note 185. If the violence is not sufficiently intense or the groups are not organized enough, then the violence will not be considered an armed conflict. See CRYER ET AL., *supra* note 185, at 283–84. See also Protocol II, *supra* note 185, art. 1(2) (noting that "situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature" are not considered armed conflicts); Rome Statute, art. 8(2)(d) (same). See also *infra* note 187 (discussing the organizational requirements necessary for an armed group).

187. To be considered an armed group or armed force under international law, a group must be organized, operate under a responsible command, and have an internal disciplinary system that enforces compliance with international humanitarian law. See Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977 art. 43(1). See also HENCKAERTS & DOSWALD-BECK, *supra* note 170, at 15–16.

188. See *supra* Part III.A.6.

189. See *supra* Part III.A.4.

The temporal scope of the alleged crimes shows a fair degree of variation. In one situation, Libya, the crimes were all committed within a two-week period. In a number of situations—like DRC, Darfur, and CAR II—the crimes were committed over a period of years. Ultimately, Libya appears to be an outlier, and the majority of ICC investigations cover a period that ranges from six months to several years.

There is also considerable variation in the number of different crime sites under investigation by the ICC in each situation. On the low end, Uganda, Mali and CAR I, all had fewer than ten crime sites each. On the other hand, five of the nine investigations involved more than twenty crime sites, and the investigation in Darfur covered at least 100 crime sites. Ultimately, it appears that the typical ICC investigation involves between twenty and thirty separate crime sites.¹⁹⁰

The victims that are the subject of the ICC's investigations are overwhelmingly civilians. The ICC does not generally investigate the killing of combatants.¹⁹¹ The only exceptions to this are the situation in Mali, where the ICC investigated the unlawful killing of combatants after they had been captured (i.e., the killing of combatants *hors de combat*)¹⁹² and the situation in Darfur where the Court investigated deliberate attacks on UN peacekeepers.¹⁹³ Other than this, the ICC has concentrated on crimes committed against civilians. These civilian victims are often members of vulnerable groups, like women and children. Moreover, the victims are often targeted because of their actual or perceived membership in disfavored ethnic or religious groups.

The number of victims of the incidents the ICC investigates varies by the type of victimization. Although data on the number of people displaced by the violence is missing for four of the situations, it is present for the remaining five situations.¹⁹⁴ And in these situations, the number of civilians displaced by the violence ranges from hundreds of thousands to more than a million. The number of other types of victims tends to be

190. More technically, the average number of crime sites per investigation was 29.4, while the median number of crime sites is 24. Whether one uses the average or median, it seems accurate to say that the typical ICC investigation includes between twenty and thirty crime sites.

191. See *supra* note 180 (noting that combatants are generally allowed to attack and kill other combatants during an armed conflict).

192. Attacking or killing combatants *hors de combat* is a violation of international law. See *supra* note 180.

193. See discussion *supra* Parts III.A.5, III.A.2.

194. It is unlawful to displace civilians from their homes through coercion as part of a widespread or systematic attack on a civilian population. See Rome Statute, art. 7(1)(d) (noting that “[d]eportation or forcible transfer of the population” is a crime against humanity); *Id.* art. 7(2)(d) (noting that this includes the “forced displacement of the persons concerned by expulsion or other coercive acts”).

smaller. Although the data on the number of civilians wounded during the commission of the crimes under investigation is missing in six of the nine situations,¹⁹⁵ it seems the number of civilians wounded is typically in the thousands.¹⁹⁶

Widespread rape is a feature of most of the ICC's investigations.¹⁹⁷ While numbers are understandably vague at the pre-investigative phase,¹⁹⁸ it appears that the typical investigation covers crimes that involve the rape of hundreds to thousands of people. Finally, the widespread murder of civilians is also a hallmark of the ICC's investigations.¹⁹⁹ Indeed, Mali stands out from the other investigations precisely because the ICC alleges that only 100–200 murders occurred while all the other investigations that provide specific estimates of the number of civilians murdered report much higher figures. Five of the seven situations for which data are available report more than a thousand murders. Consequently, it seems fair to conclude that the typical ICC investigation involves investigating the unlawful deaths of more than one thousand civilians.

The ICC's investigations are also often marked by the extreme cruelty of the crimes that are committed. Victims are not just killed, they are mutilated or disemboweled.²⁰⁰ Women (and men) are not just raped, they are gang raped or raped in public.²⁰¹ Children are abducted and forced to become fighters and sex slaves.²⁰² The crimes are also often motivated by

195. This is not atypical. See Stuart Ford, *The Complexity of International Criminal Trials Is Necessary*, 48 GEO. WASH. INT'L L. REV. 151, 166 (noting that the indictments at the ICTY often failed to contain detailed information on the number of individuals seriously injured during the alleged crimes).

196. Inflicting injuries short of death on victims can be both a war crime and a crime against humanity. See Rome Statute, art. 7(1)(k) ("intentionally causing . . . serious injury"); *Id.* art. 8(2)(a)(iii) ("[w]ilfully causing . . . serious injury").

197. Rape can be both a crime against humanity and a war crime. See Rome Statute, art. 7(1)(g) (rape as a crime against humanity); *Id.* art. 8(2)(b)(xxii) (rape as a war crime).

198. The ICC usually indicates the number of rapes that have been "reported" to the authorities. But it also frequently stresses that these numbers undercount the actual number of rapes that have occurred because of poor reporting infrastructure and the stigma that is often attached to those who report having been raped. See Situation in the Republic of Côte D'Ivoire, ICC-02/11-3, Request for authorization of an investigation pursuant to article 15, ¶ 2, 70 (June 23, 2011); Situation in the Republic of Kenya, ICC-10/09-3, Request for authorization of an investigation pursuant to Article 15, ¶ 56, 66 (Nov. 26, 2009); Office of the Prosecutor [OTP], *Background Situation in the Central African Republic* (May 22, 2007), 2; Office of the Prosecutor [OTP], *Situation in the Central African Republic II: Article 53(1) Report* ¶ 180 (Sept. 24, 2014). Thus, the "true" number of rapes is likely much higher than the figures in Table 1 suggest.

199. Murder can be both a war crime and a crime against humanity. See Rome Statute, art. 7(1)(a) (murder as a crime against humanity); *Id.* art. 8(2)(a)(i) (willful killing as a war crime).

200. See discussion *supra* Part III.A.5.

201. See discussion *supra* Part III.A.7.

202. See discussion *supra* Part III.A.9.

discriminatory intent, as the perpetrators seek out and harm members of particular ethnic or religious groups because of their membership in those groups.

Finally, while there is some variation in how the crimes are legally qualified by the OTP, there are also considerable similarities. Most noticeably, the OTP has claimed that genocide occurred in only one of the nine situations (Darfur). In one other situation (CAR II), it has said that genocide may have occurred but that further investigation is needed. In the remaining seven situations, genocide is not being considered. In contrast, crimes against humanity are alleged in eight of the nine situations, while war crimes are alleged in seven of the nine. Thus, the typical ICC investigation involves both war crimes and crimes against humanity. Genocide is rarely the subject of an investigation.

To put this all together, the typical ICC investigation covers a variety of war crimes and crimes against humanity committed during the course of an armed conflict. The ICC will usually investigate crimes committed at between twenty and thirty separate crime sites over a period of several months to several years. These crimes are typically carried out by sophisticated, hierarchically organized armed groups, and the resulting violence is systematic and widespread. In most cases, the ICC will investigate more than one perpetrator group.

The typical ICC investigation will cover crimes that resulted in the murder of more than a thousand people, the rape of anywhere from hundreds to thousands of people, serious injury to thousands, and the displacement by violence of hundreds of thousands to millions of people. The victims of these crimes will overwhelmingly be civilians, including many women and children. Usually, the perpetrators commit their crimes with a discriminatory motive. Moreover, the violence is often carried out in particularly cruel or brutal ways.

This shows that the typical ICC investigation involves crimes that are: (1) massive in scale, involving large numbers of crime sites, long time periods, and large numbers of victims; (2) terrible in nature, involving the most serious forms of victimization like murder and rape; (3) carried out in a horrific manner, almost always including the systematic and widespread brutalization of the civilian population by organized groups acting with a discriminatory motive and often also including acts of exceptional cruelty; and (4) have an enormous impact on the victims and their societies, resulting in the death or serious injury of thousands of people, often causing widespread destruction, and forcing hundreds of

thousands of people to flee the violence. Thus, applying the OTP's definition of gravity,²⁰³ we can conclude that the crimes the ICC investigates are extremely grave. As a result, one would also expect them to require significant resources to successfully investigate.²⁰⁴

203. *See supra* Part II.A.

204. *See* discussion *supra* Part II.C (arguing that crime gravity acts as a proxy for difficulty of investigation).

TABLE 1: GRAVITY OF ICC INVESTIGATIONS²⁰⁵

	DRC	Darfur	Côte D'Ivoire	Kenya	Mali	Libya	CAR I	CAR II	Uganda
Armed conflict?	Yes	Yes	Yes	No	Yes	No	Yes	Yes	Yes
Number of perpetrator groups	4	3	2	2	5	1	1	2	1
Perpetrated by armed groups?	Yes	Yes	Yes	No	Yes	Yes	Yes	Yes	Yes
Number of crime sites	24	100	45	15	9	26	7	33	6
Temporal Scope	2 years	Nearly 5 years	5 months	2 months	5 months	2 weeks	6 months	About 2 years	Up to 2 years
Identity of victims	Civilians	Civilians and UN peace-keepers	Civilians	Civilians	Civilians and combatants <i>hors de combat</i>	Civilians	Civilians	Civilians	Civilians
Number murdered	At least 1,000	Thousands	At least 1,000	At least 1,100	100-200	At least 750	Unknown	At least 2,600	Unknown
Number raped	Unknown	Thousands	At least hundreds	At least 900	50-100	Unknown	At least 600	Hundreds to thousands	Unknown
Number wounded	Thousands	Unknown	Unknown	More than 3,500	Unknown	Hundreds	Unknown	Unknown	Unknown
Number displaced	At least 140,000	Hundreds of thousands	More than 1 million	About 350,000	Unknown	Unknown	Unknown	More than 1 million	Unknown
Exceptional cruelty?	No	No	No	Yes	Yes	No	Yes	No	Yes
Discriminatory motive?	Yes	Yes	Yes	Yes	No	Yes	No	Yes	No
Type of crimes	WC and CAH	WC, CAH, and genocide	WC and CAH	CAH	WC	CAH	WC and CAH	WC, CAH, and possibly genocide	WC and CAH

C. The Gravity of Domestic Mass Atrocity Investigations

The next step is to compare the ICC's investigations to investigations of comparable gravity carried out in domestic systems. Comparable investigations, however, are hard to find. One cannot compare the average ICC investigation to the average criminal investigation in a domestic legal system because they are of much lower gravity. For example, in the

205. The data for this table comes from Parts III.B.1 to III.B.9 above.

United States, non-violent drug offenses are the most commonly charged felonies, closely followed by non-violent property offenses.²⁰⁶ Only 23% of felony defendants are accused of a violent crime and most of those are charged with assault.²⁰⁷ Less than 1% of all felony charges in the United States are for murder.²⁰⁸ Even when someone is accused of murder, they are usually alleged to have murdered only one person.²⁰⁹ In short, the vast majority of domestic criminal investigations do not come close to the gravity of the ICC's investigations.²¹⁰

There is, however, a class of cases in domestic systems that are comparable in gravity to the ICC's work—mass atrocity crimes. These cases are extremely rare in most domestic systems, but they are the closest comparators to the work of international criminal tribunals.²¹¹ For this reason, this section will explore a selection of mass atrocity crimes in domestic systems to see how they compare to the gravity of the typical ICC investigation.

There is some disagreement about what the term “mass atrocity” means. Some sources suggest that it has a predominantly legal meaning and refers to certain international crimes such as genocide, war crimes, and crimes against humanity.²¹² Others argue that the term should refer to the scope of the violence rather than their legal qualification.²¹³ For this Article, mass atrocity is not used as a legal term. Rather, it refers to the extent of the violence. Mass atrocity is defined as any extensive deliberate violence against civilians, however it is characterized under domestic or international law.²¹⁴

206. THOMAS H. COHEN & TRACEY KYCKELHAHN, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, NCJ 228944, FELONY DEFENDANTS IN LARGE URBAN COUNTIES 3 (May 2010).

207. *Id.*

208. *Id.*

209. See Ford, *supra* note 153, at 77.

210. See Stuart Ford, *Complexity and Efficiency at International Criminal Courts*, 29 EMORY INT'L L. REV. 1, 58–59 (2014) (arguing that most domestic criminal cases look nothing like the cases prosecuted by international criminal courts).

211. See Ford, *supra* note 210, at 59.

212. See Framework of Analysis for Atrocity Crimes: A Tool for Prevention (United Nations 2014) at 1 (arguing that “atrocity crimes” refers to crimes that constitute genocide, crimes against humanity, or war crimes).

213. Scott Strauss, *Identifying Genocide and Related Forms of Mass Atrocity 1* (U. S. Holocaust Memorial Museum, Working Paper Oct. 7, 2011), <https://www.ushmm.org/m/pdfs/20111219-identifying-genocide-and-mass-atrocity-strauss.pdf> (noting that while some commentators define mass atrocities as those that constitute war crimes, crimes against humanity or genocide, others use different definitions that are tied to the scope of the violence rather than their legal qualification).

214. *Cf. id.* at 21.

The following domestic mass atrocity cases were selected: (1) the 1988 bombing of Pan Am flight 103 over Lockerbie, Scotland; (2) the 1993 World Trade Center bombing; (3) the 1995 bombing of a government building in Oklahoma City; (4) the 1998 bombings of U.S. embassies in Africa; (5) the 2005 London Underground bombings; (6) the shootings and bombings committed by Anders Breivik in Norway in 2011; (7) the shooting down of Malaysian Airways flight MH17 over Ukraine in 2014; and (8) the Paris attacks in November 2015. These cases were selected based on two criteria. First, they involved intentional attacks on civilians that resulted in a large number of victims and thus constitute mass atrocity crimes.²¹⁵ Second, information was publicly available about the domestic criminal investigations that were undertaken. This latter point is very important. Governments do not routinely make information public about the size, scope, or cost of domestic criminal investigations. Thus, the selection of cases was constrained by the availability of information that could be used to compare the size and scope of domestic mass atrocity investigations to the ICC's investigations.²¹⁶

The selection of cases was also constrained by the availability of source material in English. This reliance on English-language sources naturally led to the inclusion of a number of incidents that occurred in the United States and Britain. An attempt was made to find incidents from other countries to balance this. Ultimately, incidents involving Norway, the Netherlands, and France were also included. Even after an attempt to broaden the scope of the incidents beyond the United States and Britain, however, there is still a bias towards wealthy Western democracies.

This bias means that the information collected below in Parts III.C.1–III.C.8 is not necessarily representative of all states' responses to mass atrocity crimes. For example, it is likely that developing countries react differently to mass atrocities. Among other differences, given their lower GDP's, they probably do not devote the same level of resources to mass atrocity investigations that Western democracies do. It proved difficult, however, to find reliable public information on mass atrocity

215. See *supra* text accompanying note 214 (defining mass atrocity crimes). The 1993 World Trade Center bombing had a relatively small number of victims and thus does not seem to meet the definition of a mass atrocity crime, but it would have had thousands of victims if the attackers had accomplished their objectives, see *infra* note 225, and it makes sense to think of it as an attempted mass atrocity crime.

216. For example, the 2004 Madrid train bombings were considered for inclusion in this Article but were ultimately excluded because it was very difficult to find information about the size, scope or cost of the investigation in English.

investigations in developing countries. This bias is unfortunate but difficult to avoid or compensate for.

1. Lockerbie Plane Bombing

On December 22, 1988, Pan Am flight 103 fell out of the sky and crashed to the ground near the town of Lockerbie in Scotland.²¹⁷ All 259 passengers and crew on board the plane died, as did eleven residents of the town of Lockerbie who were killed by the falling debris.²¹⁸ The cause of the crash was the detonation of an explosive device within the aircraft.²¹⁹ The investigation initially focused on a terrorist group as possible perpetrators before eventually shifting to agents of the Libyan government.²²⁰ The British government prosecuted two Libyan nationals for involvement in the bombing, although it has recently indicated that that it has evidence against two other Libyan nationals.²²¹

2. 1993 World Trade Center Bombing

On February 26, 1993, a small group of terrorists drove a rented van containing a homemade bomb into the parking lot under the World Trade Center Complex.²²² Shortly thereafter the bomb detonated killing six people and injuring more than a thousand.²²³ The bomb also caused hundreds of millions of dollars' worth of property damage.²²⁴ While the bomb only caused six deaths, the goal of the bombers was to collapse both towers of the World Trade Center.²²⁵ If they had succeeded, there would

217. See *Her Majesty's Advocate v. Al Megrahi et. al.*, Trial Judgment, Case No. 1475/99, High Court of Justiciary, ¶ 1 [hereinafter *Lockerbie Trial Judgment*].

218. *Id.*

219. *Id.* ¶ 2.

220. See Rt. Hon. Colin Boyd QC, *Politics, Crime and Criminal Justice: The Lockerbie Trial*, Int'l Soc'y for the Reform of Crim. L., 15th Int'l Conf. Canberra, Austl. 4–6 (Aug. 26–30, 2001) (on file with author) (noting that the investigation first focused on a terrorist group known as the PGLPGC before eventually turning to Libya) [hereinafter *Lockerbie Trial*].

221. See Sewell Chan, *2 Lockerbie Bombing Suspects, Libyans, Sought by U.S. and Scotland*, N.Y. TIMES (Oct. 15, 2015), http://www.nytimes.com/2015/10/16/world/europe/lockerbie-bombing-libya.html?_r=0.

222. See *United States v. Salameh*, 152 F.3d 88, 108 (2d Cir. 1998).

223. *Id.*

224. *Id.*

225. *First Strike: Global Terror in America*, FBI (Feb. 26, 2008), https://www.fbi.gov/news/stories/2008/february/tradebom_022608.

have been a much larger number of casualties. Six individuals participated in the plot.²²⁶

3. *Oklahoma City Bombing*

On April 19, 1995, an explosion severely damaged the Murrah Building in Oklahoma City.²²⁷ The bomb killed 168 people, including nineteen children, and injured hundreds more.²²⁸ The attack was largely the work of two individuals, although others knew about the plan.²²⁹

4. *U.S. Embassy Bombings*

On August 7, 1998, bombs were detonated nearly simultaneously outside U.S. Embassies in Nairobi, Kenya and Dar es Salaam, Tanzania.²³⁰ “Two-hundred and twenty-four people died” in the explosions “and more than 4,500 people were wounded.”²³¹ The investigation focused on a small number of terrorist groups with the sophistication and motivation to carry out the attacks.²³² Relatively quickly, it became clear that the bombing was the work of a terrorist group backed by Osama bin Laden.²³³

226. See *Salameh*, 152 F.3d 88, *supra* note 222, at 107–08 (indicating that the participants in the plot were Ramzi Yousef, Ahmad Ajaj, Mohammed Salameh, Nidal Ayyad, Mahmoud Abouhalima, and Abdul Yasin).

227. See *United States v. McVeigh*, 153 F.3d 1166, 1176 (10th Cir. 1998).

228. *Id.* at 1176–77.

229. *Id.* at 1177–78.

230. See James C. McKinley, Jr., *Bombings in East Africa: The Overview; Bombs Rip Apart 2 U.S. Embassies in Africa; Scores Killed; No Firm Motive or Suspects*, N.Y. TIMES (Aug. 8, 1998), <http://www.nytimes.com/1998/08/08/world/bombings-east-africa-overview-bombs-rip-apart-2-us-embassies-africa-scores.html>.

231. *East African Embassy Bombings*, In *Famous Cases & Criminals*, FBI, <https://www.fbi.gov/history/famous-cases/east-african-embassy-bombings>.

232. See Philip Shenon, *Bombings in East Africa: In Washington; Focus on Suspects in Past Attacks*, N.Y. TIMES (Aug. 8, 1998), <http://www.nytimes.com/1998/08/08/world/bombings-in-east-africa-in-washington-focus-on-suspects-in-past-attacks.html>.

233. See President William J. Clinton, Address to the Nation on Military Action Against Terrorist Sites in Afghanistan and Sudan (Aug. 20, 1998), in *U.S. Fury on 2 Continents; Clinton's Words: 'There Will Be No Sanctuary for Terrorists'*, N.Y. TIMES (Aug. 21, 1998), <http://www.nytimes.com/1998/08/21/world/us-fury-2-continents-clinton-s-words-there-will-be-no-sanctuary-for-terrorists.html> (quoting President Clinton as saying, “There is convincing information from our intelligence community that the bin Laden terrorist network was responsible for these bombings.”); James Risen, *U.S. Seeks Means to Bring Suspect from Afghanistan*, N.Y. TIMES (Aug. 20, 1998), <http://www.nytimes.com/1998/08/20/world/us-seeks-means-to-bring-suspect-from-afghanistan.html>; David Johnston, *U.S. Says Suspect Does Not Admit Role in Bombings or Ties to Saudi*, N.Y. TIMES (Aug. 18, 1998), <http://www.nytimes.com/1998/08/18/world/us-says-suspect-does-not-admit-role-in-bombings-or-ties-to-saudi.html>.

5. *London Train Bombings*

On July 7, 2005, four bombs were detonated in London.²³⁴ Three exploded inside trains, and the fourth was set off inside a crowded bus.²³⁵ The bombs killed fifty-six people, including the four bombers, and injured more than 700.²³⁶ From very early on, the attacks were treated as resulting from terrorism.²³⁷ The investigation subsequently suggested that the bombers had met with and perhaps received some training from members of Al Qaida.²³⁸

6. *Norway Attacks 2011*

In July 2011, Anders Breivik killed seventy-seven people and severely wounded forty-two more in attacks that took place in Norway.²³⁹ The attacks took place at two different locations, with the first attack consisting of a bomb that damaged government buildings in the center of Oslo and the second attack consisting of shootings at a summer camp for youth members of the governing Labour Party.²⁴⁰ The attacks were the work of an individual right-wing extremist,²⁴¹ although there was some initial concern that Breivik was working with other extremists.²⁴²

234. See HOME OFFICE, REPORT OF THE OFFICIAL ACCOUNT OF THE BOMBINGS IN LONDON ON 7TH JULY 2005, 2005-6, HC 1087, ¶ 2, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/228837/1087.pdf.

235. *Id.* ¶ 2-3.

236. *Id.* ¶ 2.

237. *Id.* ¶ 4.

238. *Id.* ¶ 42-45.

239. See Cecilia H. Leonard et al., *The Case of Anders Breivik—Language of a Lone Terrorist*, 32 BEHAV. SCI. L. 408, 408 (2014); Walter Gibbs & Elinor Schang, *Norway Police to Track Killer's Funds in Year-Long Probe*, REUTERS (Aug. 3, 2011), <http://in.reuters.com/article/idINIndia-58607220110803>.

240. See Elisa Mala & J. David Goodman, *At Least 80 Dead in Norway Shooting*, N.Y. TIMES (July 22, 2011), <http://www.nytimes.com/2011/07/23/world/europe/23oslo.html>.

241. See generally Leonard et al., *supra* note 239. See also Steven Erlanger & Scott Shane, *Oslo Suspect Wrote of Fear of Islam and Plan for War*, N.Y. TIMES (July 23, 2011), <http://www.nytimes.com/2011/07/24/world/europe/24oslo.html>; Steven Erlanger & Scott Shane, *As Horrors Emerge, Norway Charges Christian Extremist*, N.Y. TIMES (July 24, 2011), <http://query.nytimes.com/gst/fullpage.html?res=9E01E5DE143FF937A15754C0A9679D8B63&pagewanted=print>.

242. See Norway: *Anders Behring Breivik Claims 'Two More Cells'*, BBC NEWS (July 25, 2011), <http://www.bbc.com/news/world-europe-14280210>.

7. *Crash of MH17 over Ukraine*

On July 17, 2014, Malaysian Airlines flight MH17 was struck by a surface to air missile while flying over eastern Ukraine.²⁴³ The plane crashed and all 298 people aboard were killed.²⁴⁴ While other possibilities were considered, it is reasonably certain that the cause of the crash was a surface to air missile fired from a Buk missile launcher.²⁴⁵ The flight was shot down over an area that was controlled by separatist groups who were engaged in an armed conflict with the government of Ukraine.²⁴⁶ The investigation has focused on the involvement of Ukrainian rebel groups with the assistance or support of Russia.²⁴⁷

8. *Paris Attacks 2015*

On the evening of November 13, 2015, there was a series of coordinated attacks on civilians in Paris.²⁴⁸ The attacks took place over a period of about three hours and were carried out by three groups of attackers.²⁴⁹ It appears that nine or ten people were directly involved in the attacks.²⁵⁰ There were three attacks at a stadium where a soccer match was being played, four attacks at restaurants, and an attack on a rock concert.²⁵¹ More than 120 people were killed and hundreds more injured in the attacks.²⁵² Very early on, it became clear that the attacks were the

243. See DUTCH SAFETY BOARD, CRASH OF MALAYSIA AIRLINES FLIGHT MH17 HRABOVE, UKRAINE 17 JULY 2014, 9 (Oct. 2015), <https://www.onderzoeksraad.nl/uploads/phase-docs/1006/debcd724fe7breport-mh17-crash.pdf>.

244. *Id.*

245. *Id.*

246. *Id.* at 10.

247. See Nicola Clark & Andrew E. Kramer, *Malaysia Airlines Flight 17 Most Likely Hit by Russian-Made Missile, Inquiry Says*, N.Y. TIMES (Oct. 13, 2015), <http://www.nytimes.com/2015/10/14/world/europe/mh17-malaysia-airlines-dutch-report.html>; Somini Sengupta & Andrew E. Kramer, *Dutch Inquiry Links Russia to 298 Deaths in Explosion of Jetliner Over Ukraine*, N.Y. TIMES (Sept. 28, 2016).

248. See Adam Nossiter & Rick Gladstone, *Paris Attacks Kill More Than 100, Police Say; Border Controls Tightened*, N.Y. TIMES (Nov. 13, 2015), <http://www.nytimes.com/2015/11/14/world/europe/paris-shooting-attacks.html>.

249. See Adam Nossiter et al., *Three Teams of Coordinated Attackers Carried Out Assault on Paris, Officials Say; Hollande Blames ISIS*, N.Y. TIMES (Nov. 14, 2015), <http://www.nytimes.com/2015/11/15/world/europe/paris-terrorist-attacks.html?mtref=query.nytimes.com>.

250. See *Paris Attacks: The Investigation So Far*, BBC NEWS (Nov. 24, 2015), <http://www.bbc.com/news/world-europe-34822265>.

251. See *Three Hours of Terror in Paris, Moment by Moment*, N.Y. TIMES (updated Nov. 15, 2015), <http://www.nytimes.com/interactive/2015/11/13/world/europe/paris-shooting-attacks.html?ref=collection%2Fnewseventcollection%2Fattacks-in-paris>.

252. *Id.*

work of a group inspired by and possibly assisted by an Islamic extremist group called ISIS.²⁵³

D. Comparing Domestic Mass Atrocity Crime Investigations to ICC Investigations

The descriptions of the mass atrocity crimes above shed some light on what the typical mass atrocity crime investigation in a Western democracy looks like. This information is summarized in Table 2 below. Unless otherwise indicated, all information in this Section comes from the data in Table 2.

On the whole, the domestic crimes appear to be less grave than the crimes the ICC usually investigates. First, all the domestic mass atrocity crimes took place either at a single point in time or over a very small period of time. In contrast, the average ICC investigation covers events that occur over months and years.²⁵⁴ The domestic investigations also involve a smaller number of crime sites. The incident with the largest number of crime sites, the Paris attacks in 2015, took place at eight locations. Most of the other domestic incidents took place at one or two places. The typical ICC investigation, on the other hand, involves between twenty and thirty crime sites.²⁵⁵

There is also a difference in the size and number of the perpetrator groups. While one of the domestic mass atrocity crimes was committed by an individual (the attacks in Norway), the majority were committed by small groups of individuals working together. Only one incident, the shooting down of MH17 by Ukrainian rebels, involved an attack carried out by an armed group. In contrast, almost all of the ICC's investigations involve either large armed groups or the official armed forces of the state.²⁵⁶ In addition, all the domestic investigations involved a single perpetrator group. The ICC is often investigating multiple perpetrator groups committing violent acts in the same country at the same time.²⁵⁷

While the victims of both the ICC's investigations and domestic mass atrocity investigations are overwhelmingly civilians, there is a difference in the number of victims. The ICC's investigations typically involve the deaths of a thousand or more individuals, injuries to thousands more, and

253. See Nossiter et al., *supra* note 249.

254. See discussion *supra* Part III.B.

255. *Id.*

256. *Id.*

257. *Id.*

the displacement by violence of hundreds of thousands of people.²⁵⁸ They also usually involve systematic rape of the civilian population.²⁵⁹ As terrible as the domestic mass atrocity crimes described above are, they typically result in hundreds of deaths and hundreds of serious injuries. While the number of victims is not the only measure of a crime's gravity, it is a significant factor,²⁶⁰ and the ICC's investigations typically involve many more victims than the domestic investigations. They also involve types of victimization (rape and forcible displacement) that are not present in the domestic investigations.

Much like at the ICC, a discriminatory motive is a feature of these mass atrocity crimes. But, unlike the ICC, none of the domestic crimes exhibit the exceptional cruelty that is present in a significant portion of the ICC's investigations. While both the ICC and the domestic investigations involved large numbers of deaths, the ICC's investigations often involved acts of exceptional cruelty like forced amputations, death by disemboweling, and the sexual mutilation of rape victims.²⁶¹

258. *Id.*

259. *Id.*

260. *See supra* text accompanying note 109.

261. *See* discussion *supra* Part III.B.

TABLE 2: GRAVITY OF DOMESTIC INVESTIGATIONS²⁶²

	Lockerbie	WTC	OK City	Embassies	London	Norway	MH17	Paris
Armed conflict?	No	No	No	No	No	No	Yes	No
Number of perpetrator groups?	1	1	1	1	1	1	1	1
Number of perpetrators directly involved?	4	6	2	Unknown	4	1	Unknown	9 or 10
Number of crime sites?	1	1	1	2	4	2	1	8
Temporal Scope	1 day	1 day	1 day	1 day	1 day	1 day	1 day	1 day
Identity of Victims	Civilians	Civilians	Civilians	Civilians	Civilians	Civilians	Civilians	Civilians
Number murdered	259	6	168	224	56	77	298	120
Number raped	0	0	0	0	0	0	0	0
Number wounded	0	More than 1,000	Hundreds	More than 4,500	More than 700	42	0	Hundreds
Number displaced	0	0	0	0	0	0	0	0
Exceptional cruelty?	No	No	No	No	No	No	No	No
Discriminatory motive?	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes

Gravity is a function of the scale of the crimes, the nature of the crimes, the manner in which they are committed, and their impact on the victims and their communities.²⁶³ Taken together, it is hard to escape the conclusion that the typical ICC investigation covers crimes of greater gravity than the typical domestic mass atrocity investigation.²⁶⁴ The ICC's investigations typically involve crimes of a larger scale than domestic investigations because they involve a longer time period during which the crimes take place, a larger number of crime sites, and a larger number of

262. The data for this table comes from Part III.C.1–8 above.

263. See discussion *supra* Part II.A (defining gravity).

264. Indeed, this conclusion is consistent with the purpose of the ICC, which was set up to investigate and prosecute those responsible for “the most serious crimes of concern to the international community as a whole[.]” Rome Statute, *supra* note 28, Preamble. The Court was designed to address the most “grave crimes” that are committed, crimes that “threaten the peace, security and well-being of the world.” *Id.*

victims.²⁶⁵ The nature of the crimes investigated by the ICC is also graver. While both the ICC and the domestic mass atrocity investigations involve large numbers of deliberate killings, the ICC's investigations also usually involve rape, torture, inhumane treatment, and other serious wrongs.²⁶⁶

The manner in which both sets of crimes is carried out is similar in that all of the ICC's investigations and all but one of the domestic investigations have involved groups of people working together to carry out planned attacks upon civilians. They represent acts of organized violence.²⁶⁷ The ICC's investigations, however, often involve acts of exceptional cruelty that are not present in the domestic mass atrocities.²⁶⁸ The impact of the crimes investigated by the ICC is also graver than the impact of the domestic crimes.²⁶⁹ For example, one hallmark of the ICC's investigation is that the violence and destruction causes hundreds of thousands of people to flee their homes in search of safety. This forcible displacement has an enormous impact on the victims and their communities.²⁷⁰ Another hallmark of the crimes the ICC investigates is that the violence causes a breakdown in state institutions.²⁷¹ In contrast, large-scale displacement of the civilian population and the breakdown of state institutions were not present in any of the domestic mass atrocity crimes. Consequently, the ICC has typically investigated crimes of greater gravity than those investigated in domestic settings. Thus, the ICC's investigations should require greater investigative resources than the domestic mass atrocity investigations because of their greater gravity.²⁷²

But even if the domestic mass atrocity crimes were of the same gravity as the ICC's investigations, the ICC might still need more resources because there are reasons to believe that international investigations are intrinsically more difficult than domestic investigations even for crimes of the same gravity. First, the OTP must allocate sufficient investigative

265. See *supra* text accompanying note 40 (discussing how the scale of the crimes is evaluated).

266. See *supra* text accompanying note 41 (discussing how the nature of the crimes is evaluated).

267. See *supra* text accompanying note 44 (discussing now the manner the crimes are committed is evaluated).

268. *Id.*

269. See *supra* text accompanying note 45 (discussing how the impact of the crimes is evaluated).

270. See, e.g., James M. Shultz et al., *Internally Displaced "Victims of Armed Conflict" in Colombia: The Trajectory and Trauma Signature of Forced Migration*, 16 CURRENT PSYCHIATRY REP. 475 (2014) (noting that "IDPs [internally displaced persons] experience extraordinary adversities, overt danger, and psychological distress throughout all phases along the trajectory of displacement, leading to chronic elevation of risks for victimization, physical ailments, and mental disorders").

271. See *infra* text accompanying note 280.

272. See *supra* text accompanying notes 138–57 (arguing that the scope and gravity of the acts being investigated acts as a proxy for the investigative resources needed to adequately investigate those acts).

resources to establish the jurisdictional prerequisites of war crimes and crimes against humanity,²⁷³ requirements that are generally unnecessary for domestic prosecutions. The ICC also generally lacks the coercive powers that states possess.²⁷⁴ Unlike most domestic investigations, ICC investigators will often lack control of the crime scene and will not be able to compel the testimony of witnesses or the collection of documents.²⁷⁵ In addition, certain investigative techniques used in comparable domestic investigations may not be available in ICC investigations.²⁷⁶ Instead, the ICC is dependent on state cooperation and the willingness of individuals to be witnesses to build their cases.²⁷⁷ Unfortunately, state cooperation is often withheld²⁷⁸ and witnesses often refuse to participate in the investigation.²⁷⁹ In addition, the ICC will often be investigating either during or shortly after “intense political and social upheavals” characterized by widespread violence and a breakdown in state institutions.²⁸⁰ The resulting instability further complicates investigations.²⁸¹ In contrast, while all of the domestic mass atrocities

273. See *supra* text accompanying notes 143–47.

274. See Alex Whiting, *Dynamic Investigative Practice at the International Criminal Court*, 76 L. & CONTEMP. PROBS. 163, 174 (2013); Mark B. Harmon & Fergal Gaynor, *Prosecuting Massive Crimes with Primitive Tools: Three Difficulties Encountered by Prosecutors in International Criminal Proceedings*, 2 J. INT’L CRIM. JUST. 403, 405–08 (2004).

275. See Whiting, *supra* note 274, at 174. See also *Office of the Prosecutor, Strategic Plan 2016–2018*, INTERNATIONAL CRIMINAL COURT ¶ 24 (July 6, 2015), https://www.icc-cpi.int/iccdocs/otp/070715-OTP_Strategic_Plan_2016-2018.pdf (noting that lack of access to the crime scene immediately after the crime is committed decreases the quality of evidence and leads that can be obtained); Harmon & Gaynor, *supra* note 274, at 406–07.

276. See *Office of the Prosecutor, Strategic Plan 2012–2015*, INTERNATIONAL CRIMINAL COURT ¶ 19 (Oct. 11, 2013), <https://www.icc-cpi.int/iccdocs/otp/OTP-Strategic-Plan-2013.pdf> (noting that the OTP is usually unable to use “[s]pecialized investigative techniques” that are often used in national jurisdictions like “interception of voice and electronic communication”).

277. See Whiting, *supra* note 274, at 174.

278. *Id.* at 183–85 (noting that state cooperation is “largely outside the control of the [OTP] and is highly variable and unpredictable”); Harmon & Gaynor, *supra* note 274, at 413–21 (describing the difficulty of obtaining cooperation from recalcitrant states).

279. See Whiting, *supra* note 274, at 181–82 (noting that “insider witnesses” are often reluctant to cooperate because of concerns about their safety, that witnesses may be intimidated by the subjects of the investigation, and that “at no time can the prosecution compel witnesses to come to the court and testify”); Harmon & Gaynor, *supra* note 274, at 407 (noting that witnesses are often reluctant to cooperate with the court because of fear that the perpetrators—who are often members of the police or military—will harm them or their families).

280. See Whiting, *supra* note 274, at 180.

281. *Id.*; see also Harmon & Gaynor, *supra* note 274, at 406 (“Investigating a crime in an area in which armed conflict still rages or has recently terminated is obviously logistically more complicated [than most domestic investigations.]”); Minna Schrag, *Lessons Learned from the ICTY Experience*, 2 J. INT’L CRIM. JUST. 427, 430 (2004) (noting the difficulties of conducting a criminal investigation during an armed conflict, including lack of access to documents, crime scenes and witnesses).

discussed in this Article were grave crimes, none of them resulted in the widespread breakdown of state institutions. Moreover, as some former international prosecutors have noted, sometimes even simply identifying that a crime has taken place and locating the crime scene can be very difficult²⁸²—a problem that none of the domestic mass atrocity investigations have faced. For these reasons, even if the scope and gravity of domestic and ICC investigations were the same—which they are not—the ICC’s investigations would probably still be more difficult and require more resources.

IV. THE INVESTIGATIVE RESOURCES AVAILABLE IN INTERNATIONAL AND DOMESTIC INVESTIGATIONS

Given that the ICC’s investigations generally involve a higher degree of gravity and therefore a higher level of difficulty than domestic mass atrocity crimes, one would expect that the ICC has investigative resources equivalent to or exceeding that which states devote to the investigation of domestic mass atrocity crimes. This section explores that issue in more detail by looking at the ICC’s resources and comparing that to the resources that states devote to domestic mass atrocity crimes.

A. *The ICC’s Investigative Resources*

In August 2015, the OTP released a blueprint for its future: The Report of the Court on the Basic Size of the Office of the Prosecutor (hereinafter the Basic Size document).²⁸³ In it the OTP laid out what it views as the minimum investigative resources it needs to fulfill its mandate. It is important to note what this does and does not include. First, and most importantly, the Basic Size document does not describe the resources available to the ICC at this time. Indeed, the document notes that achieving the goals in the Basic Size document will require substantial expansion of the OTP, including a 33% increase in the OTP’s staff and a 43% increase in its budget, relative to 2015 levels.²⁸⁴ The OTP stated that

282. See Harmon & Gaynor, *supra* note 274, at 406.

283. International Criminal Court, Assembly of State Parties, Report of the Court on the Basic Size of the Office of the Prosecutor, ICC-ASP/14/21 (Aug. 7, 2015) [hereinafter Basic Size document]. In the interests of full disclosure, the Author worked in the Office of the Prosecutor during the Summer of 2015 and contributed to some parts of the Basic Size document. The Author did not, however, contribute to those parts of the document that describe the investigative resources the ICC needs to meet its mandate.

284. See Basic Size document, *supra* note 283, ¶ 15, at 5.

this increase in resources is necessary to avoid “the present unsustainable practice of repeatedly postponing new investigations which must be pursued in accordance with the Office’s mandate, or constantly stripping ongoing activities of critical resources so as to staff the highest prioritised activities.”²⁸⁵

At the same time, the resources requested in the Basic Size document are not extravagant. The Court is not asking for sufficient resources to respond to every demand on it, what it refers to as a “full demand” driven approach to budgeting.²⁸⁶ Rather, it seeks a situation where the OTP “will be able to adequately respond—with a reasonable degree of [prioritization]—to demands for its intervention without undermining quality and efficiency.”²⁸⁷ According to the Court, funding of the ICC consistent with the Basic Size document will result in a pace of investigative activities that will remain “below the level of full demand.”²⁸⁸

The Basic Size document then goes on to explain what investigative resources the ICC would like to be able to devote to an average investigation. An average ICC investigation will take three years.²⁸⁹ The first six months is a start-up phase where the investigative team reviews the material gathered during the preliminary examination, “studies the culture and context of the country,” and conducts missions to set up logistics and security arrangements.²⁹⁰

The investigation then enters what the OTP calls the “full investigation” phase.²⁹¹ During this phase, the investigative team spends approximately two years collecting the evidence necessary to send the case for trial.²⁹² Although the OTP is focusing on diversifying its evidence collection to include forms of evidence beyond witness statements,²⁹³

285. See Basic Size document, *supra* note 283, ¶ 3, at 3; see also *id.* at 3 n.2 (noting that the unexpected arrest of three outstanding fugitives had hampered ongoing investigations and led to the postponement of several new investigations).

286. See Basic Size document, *supra* note 283, ¶ 24, at 9 (describing a “full” demand-driven approach).

287. See Basic Size document, *supra* note 283, ¶ 5, at 3; see also *id.* ¶¶ 25–26, at 9–10.

288. See *id.* ¶ 5, at 3.

289. See *id.* ¶ 9, at 29.

290. See *id.* ¶ 10, at 29.

291. See *id.* ¶ 11, at 29.

292. See *id.*

293. For example, the OTP is increasingly relying on “satellite imagery, cyber investigations, telecommunications data, crime scene investigations (CSI), [and] financial investigations” to develop its cases. *Id.* ¶ 32, at 46.

witness statements are still a key part of the investigative process.²⁹⁴ Prior experience has shown that the OTP requires about fifty to sixty witnesses to appear in Court during an average trial.²⁹⁵ Given, however, that many witnesses are unavailable at trial for various reasons, including witness intimidation, the goal is to conduct approximately 170 witness interviews to be sure that fifty to sixty witnesses will be available to testify at trial.²⁹⁶ It is anticipated that it will take the investigative team two years to screen all of the potential witnesses,²⁹⁷ identify those that will be interviewed,²⁹⁸ and take witness statements from the 170 or so witnesses that are necessary for the case to be ready for trial.²⁹⁹ The OTP will also collect between fifteen and twenty thousand pieces of non-testimonial evidence during an average investigation.³⁰⁰

After the necessary witness statements (and other evidence) have been collected, there is a wrap-up phase of approximately six months. During this phase, the OTP develops measures to maintain contact with its witnesses and ensure their protection. It also either begins to prepare the case for trial (if an arrest is expected imminently or a suspect is in custody) or prepares the case to be hibernated (if no arrest is expected).³⁰¹ The whole process is expected to take about three years.

The number of staff assigned to the investigative team varies over time. While fewer personnel are assigned to the investigation during the start-up

294. *See id.* ¶ 11, at 29. *See also* Whiting, *supra* note 274, at 181 (noting that due to the lack of non-witness evidence in the situations the ICC investigates, witnesses—particularly insider witnesses—“will continue to be at the center of nearly all cases at the ICC”); *but see Office of the Prosecutor, Strategic Plan 2016-2018*, INTERNATIONAL CRIMINAL COURT ¶ 25 (July 6, 2015), https://www.icc-cpi.int/iccdocs/otp/070715-OTP_Strategic_Plan_2016-2018.pdf (noting that the widespread availability of phones with the capacity to take photographs and record video as well as access to the internet has made some types of electronic evidence more accessible). *See also id.* ¶ 23 (noting that satellite imagery is also now more widely available).

295. *See* Basic Size document, *supra* note 283, ¶ 12, at 30.

296. *See id.*

297. On average, only about half of those who are screened by the OTP are formally interviewed. *Id.* ¶ 13, at 30–31.

298. The OTP indicates that a thorough witness interview takes, on average, about four days to complete. *Id.* ¶ 11, at 29.

299. *See id.* ¶ 13, at 30–31.

300. This figure comes from a comparison of the table in paragraph 33 of Annex II of the Basic Size document, which indicates that the last three investigations have produced 50,000 non-testimonial pieces of evidence (or about 16,700 pieces per investigation) and the statement in paragraph 35 that the OTP anticipates collecting about 10,000 pieces of non-testimonial evidence per year during the full investigation phase (or about 20,000 per investigation). *See id.* ¶¶ 33, 35, at 46–47.

301. *See id.* at Annex I, ¶ 18.

and wrap-up phases,³⁰² the investigative team reaches a peak size of thirty personnel towards the end of the full investigation phase.³⁰³ At its largest, the investigation team will have thirteen investigators.³⁰⁴ These are the individuals that collect the evidence and conduct witness interviews. In addition, there are four individuals who input the data collected during the investigation into the various databases used to track the course of the investigation.³⁰⁵ Each team will also have three analysts who provide guidance to the investigators, identify additional lines of inquiry, and assess the quality of the evidence collected.³⁰⁶ The investigation team is also supplemented with up to nine personnel from the Prosecution Division that provide legal guidance to the investigation.³⁰⁷ This latter group includes lawyers, legal assistants, and case managers.³⁰⁸ Finally, one person is assigned from the Jurisdiction, Complementarity and Cooperation Division to provide assistance on matters that require the cooperation of states.³⁰⁹

While the formal investigative team peaks at thirty personnel,³¹⁰ that number may be supplemented with a small number of additional personnel as needed for particular specialized tasks. For example, personnel from the Scientific Response Unit provide forensic support to the investigations on an as-needed basis.³¹¹ The Operational Support Unit helps design field operations so as to minimize risk and maintain security and confidentiality.³¹² These additional personnel do not significantly increase the size of the investigation team. For example, the Scientific Response Unit has only fifteen personnel, who are expected to split their time between at least six ongoing investigations.³¹³ The Basic Size document envisions that each active investigation will be assigned one person for forensic work and one person for “cyber investigations.”³¹⁴ The

302. Sixteen personnel are assigned to the investigation during the start-up phase, and twenty personnel are assigned during the wrap-up phase. *See id.* at Annex II, ¶ 25.

303. *See id.* at Annex II, ¶ 25.

304. *See id.* at Annex II, ¶ 30–31. *See also* Whiting, *supra* note 274, at 176 (noting that the typical ICC investigation used at most twelve investigators).

305. *See* Basic Size document, *supra* note 283, at Annex II, ¶ 35–36.

306. *See id.* at Annex II, ¶ 37–38.

307. *See id.* at Annex II, ¶ 40.

308. *See id.* at Annex II, ¶ 47.

309. *See id.* at Annex II, ¶ 25.

310. *See supra* text accompanying note 303.

311. *See* Basic Size document, *supra* note 283, at Annex III, ¶ 8–9.

312. *See id.* at Annex III, ¶ 4–7.

313. *See id.* at 68.

314. *Id.*

Operational Support Unit envisions that three people will be assigned to each active investigation to contribute to operational planning.³¹⁵ Thus, these additional personnel may bring the actual number of OTP staff working on each investigation at its peak to thirty-five.

Thus, according to the model laid out in the Basic Size document, the average ICC investigation is expected to take about three years and result in the screening of about 350 potential witnesses, the taking of about 170 witness statements, and the collection of about 20,000 other pieces of evidence.³¹⁶ This investigation is undertaken by a team that varies in size between sixteen and thirty-five people. But even at its peak, the team only has thirteen actual investigators.³¹⁷ This information is summarized below in Table 3.

TABLE 3: THE ICC'S INVESTIGATIVE RESOURCES³¹⁸

	Peak Personnel	Number of Witness Interviews	Pieces of Evidence Collected
ICC	35	About 170	About 20,000

It is important to remember, however, that this does not describe the investigative resources the ICC actually has right now. This is what the ICC is asking the member states to provide in the future so it has sufficient resources to conduct “adequate” investigations in situations where its mandate requires it to respond.³¹⁹ The ICC’s actual investigative resources right now are significantly smaller than what is laid out in the Basic Size document.³²⁰

315. *Id.* at 67 (noting that “3 persons per active investigation” are assigned).

316. *See supra* text accompanying notes 289–300.

317. *See supra* text accompanying notes 302–15.

318. The data in this table comes from Part IV.A above. It represents the investigative resources assigned to an average ICC investigation.

319. *See supra* note 287 (noting that the goal of the OTP was to be able to “adequately respond” to investigative demands without “undermining quality and efficiency”).

320. *See supra* note 284 (noting that the OTP could only achieve the goals in the Basic Size document with a significant increase in its present resources).

B. Domestic Investigative Resources

Having looked at the investigative resources available to the ICC, this section will explore domestic mass atrocity investigations. The information below attempts to get a sense of the resources that states devote to investigating mass atrocity crimes. Data was collected—where available—on three factors: (1) the number of personnel assigned to the investigation; (2) the number of witness interviews conducted; and (3) the number of pieces of evidence collected. These factors were chosen because they act as indicators of the resources dedicated to the investigations. This data will then be compared to the resources available to the ICC.

1. Lockerbie bombing

According to the Lockerbie trial judgment, “[a]fter the disaster a massive police operation was mounted to recover as much as possible of the debris in order to ascertain the cause of the crash.”³²¹ This included a “massive ground search,”³²² with investigators “comb[ing] the countryside on hands and knees looking for clues in virtually every blade of grass.”³²³ The ground search involved at least 1,500 personnel.³²⁴ “Tens of thousands of items were recovered, sifted and recorded, and any that appeared to be of particular interest as indicating a possible cause of the explosion were examined by the relevant specialists.”³²⁵ All of the parts of the aircraft that were recovered were subsequently used to reconstruct it “as far as possible.”³²⁶

Investigators also devoted enormous resources to locating and interviewing potential witnesses, ultimately interviewing more than 10,000

321. See Lockerbie Trial Judgment, *supra* note 217, ¶ 3.

322. *Id.* ¶ 9.

323. *A Byte Out of History: Solving a Complex Case of International Terrorism*, FBI (Dec. 19, 2003), <https://www.fbi.gov/news/stories/2003/december/panam121903>.

324. By the end of the first week after the crash, more than 600 personnel were involved in the search. See Sheila Rule, *Powerful Bomb Destroyed Pan Am Jet Over Scotland, British Investigation Finds*, N.Y. TIMES (Dec. 29, 1988), <http://www.nytimes.com/1988/12/29/world/powerful-bomb-destroyed-pan-am-jet-over-scotland-british-investigation-finds.html>. By January of 1988, more than 1,500 personnel were involved in the search. See Steve Lohr, *Thatcher at Rites for Crash Victims*, N.Y. TIMES (Jan. 5, 1989), <http://www.nytimes.com/1989/01/05/world/thatcher-at-rites-for-crash-victims.html>. At that time, the Scottish police said the search would continue “indefinitely.” *Id.*

325. Lockerbie Trial Judgment, *supra* note 217, ¶ 3.

326. *Id.* ¶ 4.

people in “dozens of countries.”³²⁷ The investigation also included recreating the explosion by detonating plastic explosives inside a radio cassette player placed inside a garment filled suitcase that was itself placed inside a metal container similar to that used to load the luggage on Flight 103.³²⁸ This was done to demonstrate that the damage to the objects in the test was consistent with the damage to the recovered fragments of the plane and its contents. Various components of the downed plane were also subjected to extensive laboratory testing to identify the presence of explosive residue.³²⁹

The investigation began shortly after the crash and lasted at least through May of 1991.³³⁰ This means the investigation lasted at least two and half years. It also involved collecting evidence in numerous locations beyond Scotland.³³¹ The Scottish police also received assistance from the FBI, the Swiss police, the French authorities, and the German police.³³² The personnel requirements of the investigation quickly overwhelmed the local police force, which was augmented by officers from all over Scotland and England.³³³ It also overwhelmed local financial resources, and the central government stepped in to pay for the costs of the investigation and trial.³³⁴

2. 1993 World Trade Center Bombing

The investigation was a joint effort of the New York Police Department, the FBI, and the Bureau of Alcohol, Tobacco, and Firearms (ATF).³³⁵ The initial investigation of the scene of the bombing involved

327. *A Byte Out of History: Solving a Complex Case of International Terrorism*, *supra* note 323. See also *Pan Am Flight 103 Fast Facts*, CNN (Dec. 14, 2015), <http://www.cnn.com/2013/09/26/world/pan-am-flight-103-fast-facts/> (noting that more than 15,000 people in 30 countries were interviewed).

328. Lockerbie Trial Judgment, *supra* note 217, ¶ 6.

329. *Id.* ¶ 7.

330. *Id.* ¶ 14 (noting that investigative activities were still being undertaken in May 1991).

331. *Id.* ¶ 12 (noting that police visited Malta to collect evidence); *id.* ¶ 14 (noting that police collected evidence in Switzerland).

332. *Id.* ¶ 14 (FBI and Swiss police); *id.* ¶ 52 (French authorities); *id.* ¶¶ 59, 73 (German police force). See also *A Byte Out of History: Solving a Complex Case of International Terrorism*, *supra* note 323.

333. Lockerbie Trial, *supra* note 217, at 3.

334. *Id.*

335. Robert D. McFadden, *Crisis at the Twin Towers: The Explosion; Officials Studying Bomb Clues Seek Several for Questioning*, N.Y. TIMES (Mar. 4, 1993), <http://www.nytimes.com/1993/03/01/nyregion/crisis-twin-towers-explosion-officials-studying-bomb-clues-seek-several-for.html?page-wanted=all>.

more than seventy agents from the FBI, ATF, and the New York Police Department's bomb squad who entered the bomb crater to search for evidence.³³⁶ While the number of individuals who worked on the investigation from the ATF and the New York Police Department is unknown, the FBI has said that at least 700 FBI agents participated in the investigation.³³⁷

3. *Oklahoma City Bombing*

Relatively little information is available about the resources committed by state and local law enforcement to the investigation, but the federal government contributed substantial resources. The federal response was led by the FBI in conjunction with the Department of Justice, the ATF, as well as the military and local authorities.³³⁸ By the day after the explosion, the FBI had sent "four evidence response teams and explosive ordnance teams."³³⁹ The ATF had sent two national response teams and a mobile command center and the Secret Service had sent explosives experts.³⁴⁰ The Attorney General indicated that the FBI had fifty more personnel that would arrive the next day and that the ATF would send another twenty to twenty-five personnel.³⁴¹ She promised that the government would "use every possible resource to bring the people responsible to justice."³⁴²

And indeed, the resources available to the investigation grew enormously over time. Nearly 2,600 FBI agents worked on the investigation during 1995.³⁴³ While the number of investigators decreased over time, three years later, there were still more than 200 FBI agents working on the case.³⁴⁴ According to the FBI, "no stone was left unturned

336. Joseph B. Treaster, *The Twin Towers; Leading Bomb Specialists Sift Explosion Aftermath*, N.Y. TIMES (Mar. 4, 1993), <http://www.nytimes.com/1993/03/04/nyregion/the-twin-towers-leading-bomb-specialists-sift-explosion-aftermath.html>.

337. *FBI 100; First Strike: Global Terror in America*, FBI (Feb. 26, 2008), https://www.fbi.gov/news/stories/2008/february/tradebom_022608.

338. See *Terror in Oklahoma City: Official Response*, N.Y. TIMES (Apr. 20, 1995), <http://www.nytimes.com/1995/04/20/us/terror-oklahoma-city-official-response-statements-president-attorney-general.html>.

339. *Id.*

340. *Id.*

341. *Id.*

342. *Id.*

343. Howard Pankratz, *Bomb Trials Costs \$82.5 Million*, DENVERPOST.COM (Nov. 3, 1998), <http://extras.denverpost.com/bomb/bomb1103.htm>.

344. *Id.* (noting that 2,592 FBI agents worked on the investigation in 1995, 760 in 1996, 552 in 1997, and 228 in 1998).

to make sure every clue was found and all the culprits identified.”³⁴⁵ During the course of the investigation, the FBI interviewed more than 28,000 people, followed more than 43,000 leads, and collected and reviewed more than a billion pieces of information.³⁴⁶

4. U.S. Embassy Bombings

Investigators arrived from the United States shortly after the bombings to begin looking for clues.³⁴⁷ The initial team assigned to the investigation of the Kenya bombing included forty-five FBI agents, eleven CIA agents, and “scores of military intelligence officers and State Department security experts.”³⁴⁸ Within a week, the FBI contingent had risen to 120 agents, with sixty assigned to each bombing site.³⁴⁹ The investigation involved searching the area surrounding the blasts, often on hands and knees, looking for clues³⁵⁰ and trying to reconstruct the vehicles destroyed by the bomb to identify the one that contained it.³⁵¹ Ultimately, more than 900 FBI agents and many more FBI employees traveled to the sites of the bombings to collect evidence and track down the perpetrators.³⁵² This

345. See *Terror Hits Home: The Oklahoma City Bombing*, FBI, <https://www.fbi.gov/history/famous-cases/oklahoma-city-bombing> (last visited Sept. 16, 2016).

346. *Id.*

347. Jane Perlez, *Bombings in East Africa: In Dar Es Salaam; U.S. Experts Arrive to Study Clues that Killed 9*, N.Y. TIMES (Aug. 9, 1998), http://www.nytimes.com/1998/08/09/world/bombings-east-africa-dar-es-salaam-us-experts-arrive-study-clues-blast-that.html?rref=collection%2Fbyline%2Fjane-perlez&action=click&contentCollection=undefined®ion=stream&module=stream_unit&version=searc. See also Tim Weiner, *Bombings in East Africa: The Overview; Experts Starting Search for Clues in Kenya Bombing*, N.Y. TIMES (Aug. 10, 1998), <http://www.nytimes.com/1998/08/10/world/bombings-east-africa-overview-experts-starting-search-for-clues-kenya-bombing.html>.

348. Weiner, *supra* note 347.

349. *Id.*

350. Raymond Bonner, *Bombings in East Africa: The Search; As Rescuers' Final Hopes Fade, Investigators' Toil Begins*, N.Y. TIMES (Aug. 11, 1998), <http://www.nytimes.com/1998/08/11/world/bombings-east-africa-search-rescuers-final-hopes-fade-investigators-toil-begins.html>.

351. James McKinley Jr., *Bombings in East Africa: In Nairobi; FBI Sifts Vehicles' Scraps from Debris for Blast Clues*, N.Y. TIMES (Aug. 12, 1998), <http://www.nytimes.com/1998/08/12/world/bombings-east-africa-nairobi-fbi-sifts-vehicles-scraps-debris-for-blast-clues.html>; see Tim Weiner & Raymond Bonner, *Bombings in East Africa: The Investigation in Kenya; FBI Reports Finding Pieces of Bomb Truck*, N.Y. TIMES (Aug. 14, 1998), <http://www.nytimes.com/1998/08/14/world/bombings-east-africa-investigation-kenya-fbi-reports-finding-pieces-bomb-truck.html>; see Jane Perlez, *In Tanzania, Vehicle Debris Yielding Clues*, N.Y. TIMES (Aug. 16, 1998), <http://www.nytimes.com/1998/08/16/world/in-tanzania-vehicle-debris-yielding-clues.html>.

352. *East African Embassy Bombings*, FBI, <https://www.fbi.gov/history/famous-cases/east-african-embassy-bombings> (last visited Sept. 16, 2016).

eventually led to the arrest of suspects in Pakistan.³⁵³ The investigation was described at the time as the largest overseas investigation that had ever been carried out by the U.S. and similar in “size and composition” to the investigations of the 1993 World Trade Center bombing and the 1995 Oklahoma City bombing.³⁵⁴

5. *London Train Bombings*

The investigation of the London train bombings was described by the UK government as “enormous”³⁵⁵ and it involved a “massive police and intelligence effort.”³⁵⁶ The British investigators eventually received help and cooperation from the United States and more than two-dozen European countries.³⁵⁷ Within the first year, the investigators had taken more than 12,500 witness statements, collected more than 26,000 physical exhibits (of which more than 5,000 were subjected to forensic examination), and reviewed more than 6,000 hours of video footage.³⁵⁸ Ultimately, the investigators interviewed more than 30,000 people and collected 40,000 exhibits.³⁵⁹ No information was available on the number of investigators involved or the duration of the investigation.

353. David Johnston, *U.S. Hopes Arrest in Embassy Blasts Will Break Case*, N.Y. TIMES (Aug. 17, 1998), <http://www.nytimes.com/1998/08/17/world/us-hopes-arrest-in-embassy-blasts-will-break-case.html>.

354. David Johnston, *Bombings in East Africa; The Investigation; A Painstaking Search for Answers*, N.Y. TIMES (Aug. 12, 1998), <http://www.nytimes.com/1998/08/12/world/bombings-in-east-africa-the-investigation-a-painstaking-search-for-answers.html>.

355. REPORT OF THE OFFICIAL ACCOUNT OF THE BOMBINGS IN LONDON ON 7TH JULY 2005, 2006, HC 1087, ¶ 74 (U.K.).

356. *Id.* ¶ 4.

357. See Elaine Sciolino & Don Van Natta Jr., *With No Leads, British Consult Allies on Blasts*, N.Y. TIMES (July 11, 2005), <http://query.nytimes.com/gst/fullpage.html?res=9503E6DA123DF932A25754C0A9639C8B63&pagewanted=all>. See also Don Van Natta Jr. & Elaine Sciolino, *Bombs in London Are Now Called Military Quality*, N.Y. TIMES (July 12, 2005) <http://www.nytimes.com/2005/07/12/world/europe/bombs-in-london-are-now-called-military-quality.html?mtref=www.google.com&gwh=7DBAB25B22BBF4E66359CE6F4F1A27E2&gwt=pay> (noting cooperation with U.S. and European authorities).

358. REPORT OF THE OFFICIAL ACCOUNT OF THE BOMBINGS IN LONDON ON 7TH JULY 2005, 2006, HC 1087, ¶ 74 (U.K.).

359. See Lady Justice Hallett, *Concluding Remarks, Coroner's Inquests into the London Bombings of 7 July 2005*, Hearing Transcripts pp. 4–5, ll. 16–25 (May 6, 2011), http://webarchive.nationalarchives.gov.uk/20120216072438/http://7julyinquests.independent.gov.uk/hearing_transcripts/06052011am.htm (last visited Aug. 3, 2015).

6. *Norway Attacks 2011*

The investigation of Anders Breivik's crimes took more than one year and the crimes were investigated by a specially created task force comprised of more than 100 investigators with specialties in evidence, victims, witnesses, and international cooperation.³⁶⁰ In the first six weeks after the attacks, the investigators interviewed more than 450 people with further interviews expected as the investigation continued.³⁶¹ The Norwegian authorities received assistance from the governments of the U.S., Britain, and other Nordic countries.³⁶²

7. *Crash of MH17 over Ukraine*

While the victims of MH17 came from about a dozen countries, the largest number of victims came from the Netherlands.³⁶³ Thus, the Netherlands has led the investigation into the attack. Substantial assistance has also come from Australia and Malaysia. The Dutch government described the investigation of the crash of MH17 as "a highly complex undertaking, which will take considerable time."³⁶⁴ The team was led by eight prosecutors from the Public Prosecution Service.³⁶⁵ They were supported by an investigation team that consisted of "expert detectives from a variety of backgrounds, including international crime, high-tech crime, and forensics."³⁶⁶ Investigation personnel also came from the Royal Military and Border Police as well as the Aviation Police.³⁶⁷ Initially, the Dutch sent forty police investigators to the scene of the crash.³⁶⁸ It appears

360. See Walter Gibbs & Elinor Schang, *Norway Police To Track Killer's Funds in Year-Long Probe*, REUTERS NOR. (Aug. 3, 2011), <http://in.reuters.com/article/2011/08/03/idINIndia-58607220110803>. See also Aled-Dilwyn Fisher, *Breivik police question 'Fjordman'*, NEWSINENGLISH.NO (Aug. 4, 2011), <http://www.newsinenglish.no/2011/08/04/breivik-police-question-fjordman/> (noting that within two weeks of the attacks, there were already more than 100 Norwegian police officers working on the investigation).

361. See John Price, *Breivik investigation 'could last several months'*, THE FOREIGNER (Aug. 30, 2011), <http://theforeigner.no/pages/news/breivik-investigation-could-last-several-months/>.

362. Gibbs & Schang, *supra* note 360.

363. See Clark & Kramer, *supra* note 247.

364. See *Letter to the House of Representatives from Minister of Foreign Affairs Frans Timmermans and Minister of Defence Jeanine Hennis-Plasschaert regarding the MH17 air disaster*, 7 (Oct. 9, 2014), <https://www.government.nl/binaries/government/documents/parliamentary-documents/2014/10/27/letter-to-the-house-of-representatives-regarding-the-mh17-air-disaster/mh17-letter-2014-10-09.pdf>.

365. *Id.*

366. *Id.*

367. *Id.*

368. See Scott Neuman, *Australia Sending 190 Police to Secure MH17 Wreckage*, NPR (July 25,

this was later increased to ninety personnel onsite.³⁶⁹ In addition, 750 police investigators worked on the case in the Netherlands, bringing the total number of Dutch investigators to 840.³⁷⁰

In addition to the Dutch investigators, Australia initially sent forty-five investigators to the crime scene in Ukraine.³⁷¹ This was later increased to ninety personnel.³⁷² It was then increased again to 190.³⁷³ Malaysia sent a team of more than 130 investigators and forensic specialists to the crash site.³⁷⁴ The examination of the human remains was conducted by a multinational team of more than 200 forensic specialists from Australia, Germany, Belgium, Great Britain, New Zealand, Indonesia, and Malaysia.³⁷⁵

The investigation collected nearly 5 billion webpages, viewed more than 500,000 photographs and videos, and listened to more than 150,000 telephone intercepts.³⁷⁶ Finally, the Dutch authorities recovered twelve train cars of wreckage that were transported back to the Netherlands for forensic analysis.³⁷⁷ The wreckage was “examined in detail, piece by piece.”³⁷⁸ During the course of the investigation, the investigators made

2015), <http://www.npr.org/sections/thetwo-way/2014/07/25/335189945/australia-sending-190-police-to-secure-mh17-wreckage>; Tom Burridge, *Dutch military police in Ukraine to investigate flight MH17*, BBC NEWS (July 26, 2014), <http://www.bbc.com/news/world-europe-28506109>.

369. See 840 Dutch police officers are involved in MH17 crash investigation, DUTCHNEWS.NL (Aug. 1, 2014), http://www.dutchnews.nl/news/archives/2014/08/840_dutch_police_officers_are/.

370. *Id.*; see also Binnenland, 840 agenten werken aan MH17, NOS (Aug. 1, 2014), <http://nos.nl/artikel/681783-840-agenten-werken-aan-mh17.html>.

371. See Kristin Shorten, *Australian Federal Police join international investigation into MH17*, NEWS.COM.AU (July 22, 2014), <http://www.news.com.au/travel/travel-updates/australian-federal-police-join-international-investigation-into-mh17/story-fnizu68q-1226997936671>.

372. See *Armed Australian soldiers, police deploy to MH17 crash site*, RT NEWS (July 25, 2014), <http://rt.com/news/175444-armed-police-ukraine-mh17/>.

373. See Neuman, *supra* note 368.

374. See *MH17 plane crash: Dutch experts examine bodies*, BBC NEWS (July 21, 2014), <http://www.bbc.com/news/world-europe-28399406>.

375. See *FAW Special Operations Flight MH17*, <https://www.politie.nl/en/themes/qa-flight-mh17.html>. Of these, 120 were Dutch and the remaining eighty were from other countries. *Id.*

376. Somini Sengupta & Andrew E. Kramer, *Dutch Inquiry Links Russia to 298 Deaths in Explosion of Jetliner Over Ukraine*, N.Y. TIMES (Sept. 28, 2016); *Presentation Preliminary Results Criminal Investigation MH17*, OM.NL (Sept. 28, 2015), <https://www.om.nl/onderwerpen/mh17-vliegcrash/presentaties/presentation-joint/>.

377. See *Letter of 17 December 2014 from the Minister of Security and Justice, Ivo Opstelten, the Minister of Foreign Affairs, Bert Koenders, and Minister of Defense Jeanine Hennis-Plasschaert to the President of the House of Representatives concerning the current state of affairs with regard to the MH16 air disaster 1* (Dec. 17, 2014), <https://www.government.nl/binaries/government/documents/parliamentary-documents/2014/12/23/letter-about-the-current-state-of-affairs-with-regard-to-the-mh-17-disaster/jul13980.pdf>.

378. See *Presentation Preliminary Results Criminal Investigation MH17*, *supra* note 376.

sixty requests for legal assistance to more than twenty countries.³⁷⁹ In the first five months of the investigation alone, the Dutch government spent more than €36 million.³⁸⁰

8. *Paris Attacks 2015*

The investigation covers both Paris, where the attacks took place, and a suburb of Brussels, where some of the attackers appear to have been from.³⁸¹ In the first week after the attacks, the French police carried out 793 raids and arrested 107 people as a result of the investigation.³⁸² By the end of the second week, French authorities had conducted more than 1,200 raids.³⁸³ More than 10,000 police officers were deployed to carry out the raids.³⁸⁴ Belgian police also carried out numerous raids in and around Brussels.³⁸⁵ The French Parliament also passed a law to assist in the investigation, which permitted the French authorities to make warrantless searches, engage in more aggressive interrogation of individuals, and place people under house arrest without judicial intervention.³⁸⁶ There was considerable international cooperation with the French investigation, with the French authorities being assisted by the Belgian, German, and Turkish authorities.³⁸⁷

379. *Id.*

380. See Ingrid Grindstad, *Over 36M Spent on MH17 Investigation So Far*, NLTIMES.NL (Nov. 21, 2014), <http://www.nltimes.nl/2014/11/21/e36m-spent-mh17-investigation-far/>.

381. See *Paris attacks: The investigation so far*, BBC NEWS (Nov. 24, 2015), <http://www.bbc.com/news/world-europe-34822265>.

382. *Id.*

383. See *Latest on the investigation into the November attacks in Paris*, RFI (Nov. 25, 2015), <http://www.english.rfi.fr/france/20151125-latest-developments-going-investigation-paris-attacks>.

384. See Adam Nossiter, *Paris Attacks Spur Emergency Edict and Intense Policing in France*, N.Y. TIMES (Nov. 23, 2015), <http://www.nytimes.com/2015/11/24/world/europe/in-france-some-see-the-police-security-net-as-too-harsh-paris-attacks.html>.

385. See Andrew Higgins & Kimiko De Freytas-Tamura, *16 Arrests in Belgium Terrorism Raids*, N.Y. TIMES (Nov. 22, 2015), <http://www.nytimes.com/2015/11/23/world/europe/brussels-remains-on-highest-alert-level-as-manhunts-expand.html>.

386. See Nossiter, *supra* note 384.

387. See *supra* note 381; see also Michael Safi et al., *Paris attacks: investigation spreads across Europe as terrorist identified*, THE GUARDIAN (Nov. 25, 2015), <http://www.theguardian.com/world/2015/nov/15/paris-attacks-investigation-spreads-across-europe-as-terrorist-identified>.

C. Comparing the ICC's Resources to Domestic Resources

This section compares domestic investigations to the ICC's investigations by the number of personnel assigned to the investigation at its peak, the number of witnesses interviewed during the course of the investigation, and the number of pieces of evidence collected during the investigation. While it was not possible to find information on each of these variables for every domestic investigation, information on at least two of the variables was found for six of the eight domestic investigations, and all eight had information on at least one of them. The information on domestic mass atrocity investigations is summarized below in Table 4. All the information discussed in this Section comes from the data in Table 4 unless otherwise indicated. For comparison purposes, the ICC's investigative resources are summarized in the right-hand column of Table 4. As noted above, the ICC expects that an average investigation team will have about thirty-five personnel at peak size and that an average investigation will screen around 350 potential witnesses, take about 170 witness statements, and collect about 20,000 other pieces of evidence.³⁸⁸

TABLE 4: INVESTIGATIVE RESOURCES IN DOMESTIC INVESTIGATIONS³⁸⁹

	Lockerbie	WTC	OK City	Embassies	London	Norway	MH17	Paris	ICC
Peak personnel	1,500	More than 700	More than 2,600	More than 900	Unknown	More than 100	More than 1,300	More than 10,000	35
Number of witness interviews	10,000	Unknown	28,000	Unknown	30,000	More than 450	Unknown	Unknown	170
Pieces of evidence collected	Tens of thousands	Unknown	More than 1 billion	Unknown	40,000	Unknown	More than 5 billion	Unknown	20,000

Comparing the ICC's investigations to the domestic investigations shows that all but one of the domestic investigations discussed in this Article had vastly more resources than the ICC's investigations. The investigation of Anders Breivik in Norway is something of an outlier and will be discussed separately. All of the other domestic mass atrocity investigations had tens to hundreds of times more resources than the ICC.

388. See *supra* text accompanying notes 291–300, 310–16.

389. The data in this table comes from Parts IV.B.1 to IV.B.8 above, except for the data on the ICC, which comes from Table 3.

The Breivik investigation looks quite different from the other domestic mass atrocity investigations. More than 100 investigators worked on the case. This is still three times the number assigned to the average ICC investigation, but significantly fewer than in any of the other domestic investigations. The Norwegian investigators conducted at least 450 interviews. This is two and a half times as many interviews as the average ICC investigation but much less than any of the other domestic investigations.³⁹⁰ There is no information on how many pieces of non-testimonial evidence the Breivik investigation collected.

The Breivik investigation looks like it had about three times as many resources as the average ICC investigation, but it is not fair to compare the Breivik investigation to the average ICC investigation for several reasons. First, the Breivik investigation involved a single perpetrator, just two crime sites, and a much smaller number of victims than the average ICC investigation. It was a crime of significantly lower gravity than what the ICC typically investigates.³⁹¹ Second, it had a number of features that simplified the investigation. For example, the perpetrator was captured right away³⁹² and left behind a detailed manifesto outlining his actions.³⁹³ He also readily confessed.³⁹⁴ In short, it was a crime of significantly lower gravity and investigative complexity than the ICC typically faces. As a result, one would expect it to consume significantly fewer resources. Thus, comparing the Breivik investigation to the average ICC investigation is inappropriate.

Focusing on the domestic investigations that are comparable to the ICC's investigations, it appears that those domestic investigations had at least ten and sometimes more than one hundred times the resources of the average ICC investigation. Starting with the peak number of personnel assigned to the investigation, the smallest investigation (the 1993 World Trade Center bombing) had at least 700 people working on it at its peak. The largest investigation (the Paris attacks) had more than 10,000 people

390. On the other hand, this particular comparison may be misleading. The Norwegian investigators took 450 witness statements in the first six weeks of the investigation. *See Price, supra* note 361. We do not know the total number of statements they took during the entire yearlong investigation, and the final figure may have been considerably larger than 450.

391. *See* discussion *supra* Part III.B (discussing the gravity of a typical ICC investigation).

392. *See* Elisa Mala & J. David Goodman, *At Least 80 Dead in Norway Shooting*, N.Y. TIMES (July 22, 2011), <http://www.nytimes.com/2011/07/23/world/europe/23oslo.html> (noting that Anders Breivik had been arrested on the same day as the violence).

393. *See* Steven Erlanger & Scott Shane, *As Horrors Emerge, Norway Charges Christian Extremist*, N.Y. TIMES A1 (July 24, 2011).

394. *See* Steven Erlanger, *Amid Tears, Flickering Candles and Flowers, a Shaken Norway Mourns*, N.Y. TIMES (July 24, 2011), <http://www.nytimes.com/2011/07/25/world/europe/25oslo.html>.

working on it. This is anywhere from twenty to three hundred and thirty times more personnel than the ICC has for its investigations. Moreover, it is important to note that the figures for domestic investigators represent minimums and the actual number of investigators involved might be significantly higher than Table 4 suggests. For example, information on the U.S. investigations only includes data on the number of FBI personnel involved even though we know that numerous other U.S. law enforcement agencies contributed personnel to the investigations.³⁹⁵ There is a huge disparity in the number of personnel available in domestic and international investigations.

Looking next at the number of interviews undertaken during the investigation, the numbers range from 10,000 on the low end in the Lockerbie investigation to 30,000 in the London bombings investigation. This corresponds to between fifty-five and one hundred and seventy-five times as many interviews as the ICC anticipates taking during an average investigation. This is an enormous difference. At the rate of 170 interviews every three years (the typical pace for an ICC investigation),³⁹⁶ the ICC would take more than 150 years to conduct the same number of interviews as were conducted just during the Lockerbie investigation.

Finally, there is more variability in the number of pieces of evidence collected during the investigations. On the one hand, the Lockerbie and London bombings investigations reported collecting tens of thousands of pieces of evidence. This exceeds what the ICC anticipates collecting during a typical investigation, but not by a huge amount. On the other hand, the World Trade Center investigation and the MH17 investigation both reported collecting billions of pieces of evidence. The latter two investigations collected thousands of times more evidence than the ICC anticipates collecting.

Even though the data is incomplete—there are a number of boxes in Table 4 for which there is no available information—the results are still clear. Leaving aside the Breivik investigation, all of the other domestic mass atrocity investigations in this study had vastly more resources than the ICC’s average investigation. The evidence suggests that these domestic investigations have had at least ten times as many resources as the average ICC investigation and sometimes more than one hundred times as many resources. This is an enormous difference, particularly given that the ICC investigates crimes that are more grave and difficult to

395. See *supra* text accompanying notes 335–37, 338, 348.

396. See discussion *supra* Part III.A.

complete successfully than those investigated by states.³⁹⁷ This strongly suggests that the ICC is under-resourced and that it should have more resources given the gravity and investigative difficulty of the crimes before the Court.

V. CONCLUSIONS

There is an ongoing debate between states and the ICC over whether the Court has sufficient resources.³⁹⁸ This Article sheds light on that question by comparing the court's investigations to comparable investigations carried out by states. The first and most important conclusion of this Article is that the ICC is enormously under-resourced compared to domestic mass atrocity investigations in Western Europe and the United States. The ICC tackles investigations that are greater in gravity and difficulty than even the most serious domestic mass atrocity investigations.³⁹⁹ As terrible as the domestic crimes described in this Article are, the ICC regularly investigates situations with more victims of all types.⁴⁰⁰ Its investigations also involve larger numbers of perpetrator groups, more crime sites, and crimes that take place over a much longer period of time.⁴⁰¹ They also tend to involve acts of exceptional brutality and have a larger impact on the societies where they take place.⁴⁰² As a result of the greater gravity and difficulty of the ICC investigations, they require greater investigative resources than the domestic investigations described in this Article.⁴⁰³

Yet, the ICC has vastly fewer resources than most domestic mass atrocity investigations. The ICC's investigative teams peak at thirty-five personnel, of which only thirteen are actual investigators.⁴⁰⁴ In contrast, states regularly assign a thousand or more personnel to the most serious domestic crimes. For example, more than 1,500 personnel worked on the Lockerbie investigation, more than 2,600 worked on the Oklahoma City bombing, and more than 1,300 worked on the MH17 crash investigation.⁴⁰⁵ In many cases, the actual numbers of investigators

397. See discussion *supra* Part III.D.

398. See *supra* text accompanying notes 1–6.

399. See discussion *supra* Part III.D.

400. *Id.*

401. *Id.*

402. *Id.*

403. *Id.*

404. See discussion *supra* Part IV.A.

405. See *supra* Table 4.

assigned to the domestic investigations may well be higher than these numbers suggest.⁴⁰⁶ Domestic investigations also regularly interview tens of thousands of witnesses, compared to just 170 for the ICC. For example, more than 10,000 witnesses were interviewed during the Lockerbie investigation, 28,000 were interviewed during the Oklahoma City investigation, and more than 30,000 were interviewed during the London investigation.⁴⁰⁷ Ultimately, domestic mass atrocity investigations in the United States and Western Europe usually have tens to hundreds of times more resources available to them than the average ICC investigation, despite being intrinsically less difficult investigations.⁴⁰⁸ This shows that the ICC does not have sufficient resources to conduct the extremely difficult investigations it is tasked with completing.

This Article's second conclusion is that the ICC's relative lack of resources is partly to blame for some of the difficulties it has faced. The ICC has been less effective than was expected.⁴⁰⁹ There are many reasons for this, but one of the most important is that it does not have the resources to conduct the kind of investigations that are necessary to respond to mass atrocity crimes.⁴¹⁰ To put it bluntly, it appears that several early cases were compromised by the lack of investigative resources.⁴¹¹ Of course, the lack of resources is not the only cause of the ICC's difficulties. It appears

406. For example, we know only the number of FBI agents assigned to the World Trade Center, Oklahoma City and Embassy bombing investigations, but each of these investigations was a joint investigation with other agencies. We do not know how many personnel from these other agencies participated in the investigations. See *supra* text accompanying notes 335–37, 338, 348. Thus, it seems certain that the figures shown in Table 4 undercount the actual number of investigators assigned to those investigations.

407. See *supra* Table 4.

408. See discussion *supra* Part IV.C.

409. See Whiting, *supra* note 274, at 164 (noting that “the OTP has not to date had the successes it had hoped for or expected”); Dermot Groome, *No Witness, No Case: An Assessment of the Conduct and Quality of ICC Investigations*, 3 PENN ST. J. L. & INT’L AFF. 1, 1–3 (2014).

410. See Dermot Groome et al., *Expert Initiative on Promoting Effectiveness at the International Criminal Court*, 62–63 (Dec. 2014), <https://dickinsonlaw.psu.edu/sites/default/files/Groome-ICC-Expert-Report-Dec-2-2014.pdf> (noting that some of the problems that gave rise to flawed investigations at the ICC stemmed from “a lack of sufficient capacity to investigate these complex crimes” and concluding that the OTP “appears to lack the resources it needs to adequately investigate situations to the high standard required”).

411. See *Office of the Prosecutor, Strategic Plan June 2012-2015*, INTERNATIONAL CRIMINAL COURT ¶ 17-18 (2013), <https://www.icc-cpi.int/iccdocs/otp/OTP-Strategic-Plan-2013.pdf> (noting that the OTP lacked the resources to fully staff its investigations and that the judges had indicated that they expected the OTP to develop “a more substantial range of evidence in its cases”); *Id.* ¶ 23 (noting that the OTP will try to “expand and diversify its collection of evidence so as to meet the expectations of Chambers”). See also Whiting, *supra* note 274, at 164 (noting that some of the ICC’s judges were concerned that the ICC’s cases were not strong enough and that they relied on “undeveloped evidence”).

that the OTP also made some strategic mistakes in its early investigations which undermined several of its cases,⁴¹² but the OTP has made changes in recent years to improve its investigative technique to address many of these problems.⁴¹³ The resource deficit, however, persists.

In contrast, the domestic mass atrocity investigations described in this Article had the resources to conduct extremely thorough investigations.⁴¹⁴ Moreover, most of the domestic mass atrocity investigations described in this Article can probably be described as successful in the sense that they succeeded in identifying and bringing to justice many of those responsible for the atrocities.⁴¹⁵ But this success is due, at least in part, to the enormous resources allocated to those investigations. They have been able to follow every lead, question every potential witness, and collect every piece of evidence.⁴¹⁶ The ICC's investigations, in comparison, are much

412. See generally Groome, *supra* note 409. See also Groome et al., *supra* note 410, at 52–61 (describing various shortcomings in the ICC's investigations).

413. See Office of the Prosecutor, *Strategic Plan 2016-2018*, INTERNATIONAL CRIMINAL COURT ¶ 1, 13 (2015), https://www.icc-cpi.int/iccdocs/otp/070715-OTP_Strategic_Plan_2016-2018.pdf (noting that a switch from “focused” investigations to “open-ended, in-depth investigations” had improved the quality of ICC investigations as indicated by the rate at which the Pre-Trial Chamber had confirmed charges).

414. See discussion *supra* Part IV.B (discussing the resources available in domestic mass atrocity investigations).

415. For example, the United States has been quite successful in investigating and prosecuting those responsible for mass atrocity crimes. See Department of Justice, *Fact Sheet: Prosecuting and Detaining Terror Suspects in the U.S. Criminal Justice System*, DOJ (June 9, 2009), <http://www.justice.gov/opa/pr/fact-sheet-prosecuting-and-detaining-terror-suspects-us-criminal-justice-system>; HUMAN RIGHTS FIRST, TRYING TERROR SUSPECTS IN FEDERAL COURTS, (2016), <https://www.humanrightsfirst.org/wp-content/uploads/pdf/USLS-Fact-Sheet-Courts.pdf> (noting that U.S. courts have successfully prosecuted almost 500 individuals for terrorism-related charges since the September 11th attacks); Phil Hirschhorn, *Another Successful Terrorism Trial Inside the US*, JUST SECURITY (Feb. 27, 2015), <https://www.justsecurity.org/20504/successful-terrorism-trial-us-bin-ladens-man-london-facing-life-prison/> (noting that the US was able to successfully prosecute those responsible for the East African embassy bombings); Matt Apuzzo, *A Holder Legacy: Shifting Terror Cases to the Civilian Courts, and Winning*, N.Y. TIMES (Oct. 21, 2014), <http://www.nytimes.com/2014/10/22/us/a-holder-legacy-shifting-terror-cases-to-the-courts-and-winning.html>. The United Kingdom also appears to have been relatively successful in investigating and prosecuting such crimes. See MI5, *Arrests and Convictions*, <https://www.mi5.gov.uk/home/about-us/what-we-do/the-threats/terrorism/international-terrorism/arrests-and-convictions.html> (last visited Sep. 17, 2016).

416. See *supra* text accompanying note 345 (noting that domestic investigations have been able to “leave no stone unturned” in investigating mass atrocity crimes). In other examples, President Clinton, in the aftermath of the U.S. Embassy bombings, vowed to “use all means at our disposal to bring those responsible to justice no matter what or how long it takes.” See Philip Shenon, *Bombings in East Africa: In Washington; Focus on Suspects in Past Attacks*, N.Y. TIMES (Aug. 8, 1998), <http://www.nytimes.com/1998/08/08/world/bombings-in-east-africa-in-washington-focus-on-suspects-in-past-attacks.html>. After the London train bombings, Prime Minister Tony Blair promised that “[t]here will of course now be the most intense police and security service action to make sure that we bring those responsible to justice.” See Associated Press, *Blair delivers a classically British rallying*

different. The average ICC investigation will only have a total of thirteen investigators and will only take about 170 witness statements.⁴¹⁷ The ICC investigators cannot hope to follow every lead or talk to every potential witness. The resulting investigations are surely weaker than they would have been if the ICC had the same resources as comparable domestic investigations.⁴¹⁸ Thus, it appears that the ICC's lack of resources is at least partly to blame for its relative lack of success.

This Article's third conclusion relates to the role of international cooperation in the success of mass atrocity investigations. One of the obstacles the ICC faces is a lack of state cooperation.⁴¹⁹ The ICC is weaker than any state, even states like Sudan that have been largely ostracized by the international community.⁴²⁰ Due to the absence of strong international support, Sudan has been able to effectively stonewall the ICC.⁴²¹ As a result, the ICC has publicly acknowledged that it is unable to successfully investigate or prosecute crimes committed in Darfur without international support.⁴²² The ICC's experience in Sudan demonstrates that the Court cannot succeed unless states that support it apply pressure on recalcitrant states.⁴²³ This conclusion is reinforced by the study of domestic mass atrocity investigations contained in this Article.

A prominent feature of the domestic investigations discussed in this Article is the importance of state cooperation for the success of mass atrocity investigations. For example, the Lockerbie investigation relied upon cooperation from the U.S., French, Swiss, and German authorities.⁴²⁴ The U.S. Embassy bombings investigation relied upon cooperation from Kenya and Tanzania for access to the crime sites. The British investigation of the London train bombings relied upon cooperation from the United States and more than two dozen European countries.⁴²⁵ The Norwegian investigation of Anders Breivik relied upon cooperation from the U.S.,

cry, NBC NEWS (July 7, 2005), http://www.nbcnews.com/id/8502984/ns/world_news-attacks_on_london/t/blair-delivers-classically-british-rallying-cry/#.Vk-cGHArTcs.

417. See discussion *supra* Part IV.A.

418. See Whiting, *supra* note 274, at 164 (noting that "the OTP may never be able to conduct investigations that are as comprehensive as what can be done in a national jurisdiction").

419. See *supra* text accompanying note 278.

420. See Stuart Ford, *The ICC and the Security Council: How Much Support Is There For Ending Impunity?*, 26 IND. INT'L & COMP. L. REV. 33, 62–63 (2016).

421. *Id.* at 38.

422. *Id.* at 34.

423. *Id.* at 63–64.

424. See *supra* text accompanying notes 331–32.

425. See *supra* text accompanying note 357.

Britain, and other Nordic countries.⁴²⁶ The MH17 crash investigation required close cooperation between investigators from the Netherlands, Australia, and Malaysia.⁴²⁷ In addition, these three countries received support and cooperation from Germany, Belgium, New Zealand, Indonesia and many other countries.⁴²⁸ The investigators were also dependent on cooperation from both Ukraine and the Ukrainian rebels for access to the crime scene. Russia's refusal to cooperate, on the other hand, has made the MH17 crash investigation much harder.⁴²⁹ Finally, the French investigation of the Paris attacks received cooperation from Belgian, German, and Turkish authorities.⁴³⁰

As these examples show, international cooperation is vital to the success of mass atrocity investigations, whether they are domestic or international. While domestic investigations were generally able to secure the cooperation of other states, the ICC has had difficulty securing state cooperation. The inability to secure state cooperation is another reason the ICC has been less successful than domestic mass atrocity investigations.

This Article's fourth and final conclusion is that the ICC's investigative resources should be significantly increased because that will improve the Court's outcomes. The ICC is under-resourced which is at least partly to blame for its lack of success. Moreover, the comparison between domestic and international investigations suggests that the ICC would be more successful if it had the resources to conduct investigations more like those carried out in response to domestic mass atrocity crimes. This leads to the conclusion that significantly increasing the ICC's investigative resources would improve the ICC's success.

Moreover, by focusing on the question of success it may be possible to convince the members of the Assembly of States Parties to support an increase in the ICC's resources. First, there is broad support for the

426. See *supra* text accompanying note 362.

427. See *supra* Part IV.B.7.

428. See *supra* text accompanying note 375.

429. For example, the Russian government has consistently denied that a missile caused the crash and offered its own "evidence" to support this claim. See Sengupta & Kramer, *supra* note 376. This has forced the MH17 investigation team to spend considerable time investigating and ruling out these alternative theories. See *Presentation Preliminary Results Criminal Investigation MH17*, *supra* note 376 (noting that alternative theories needed to be carefully investigated so that if defendants presented them in court the prosecution would be ready to "demonstrate that they did not take place"). The Russian government also refused to provide relevant information in its custody to the investigation. See Sengupta & Kramer, *supra* note 376 (noting that the Russian government had refused to provide radar data despite being asked to do so).

430. See *supra* text accompanying note 387.

success of the ICC within the international community.⁴³¹ Most states agree that there should be an end to impunity and that the ICC represents one of the international community's signature initiatives to end impunity.⁴³² There are 124 state parties to the Rome Statute⁴³³ and support for the ICC exists on virtually every continent, including Europe, Central America, South America, and Africa.⁴³⁴ Even Russia and China, the two states who have done the most to block support for the ICC at the international level, agree in principle that the Court should be successful.⁴³⁵

Second, states are rational actors who make decisions on whether to create or become members of international organizations based on a calculation of costs and benefits.⁴³⁶ Thus, an economic argument may be more persuasive for member states than a moral one. The ICC was established to achieve certain goals.⁴³⁷ States pay for the ICC with the expectation that it will be successful in achieving these goals.⁴³⁸ They want the ICC to be successful in achieving these goals.⁴³⁹ By increasing the ICC's investigative resources, states can improve the Court's likelihood of success and thereby derive greater benefit from membership in the Court. Thus, by focusing on the relationship between investigative resources and success, it may be possible to convince states that increasing the ICC's investigative resources is in their own interests.

431. See generally Ford, *supra* note 420.

432. *Id.* at 45–50.

433. See *The State Parties to the Rome Statute*, INTERNATIONAL CRIMINAL COURT, https://asp.icc-cpi.int/en_menus/asp/states%20parties/Pages/the%20states%20parties%20to%20the%20rome%20statute.aspx (last visited Sept. 2016).

434. *Id.*

435. *Id.* at 53–55.

436. See Kenneth W. Abbott & Duncan Snidal, *Why States Act through Formal International Organizations*, 42 J. CONFLICT RESOL. 3, 6 (1998) (“We assume, for simplicity, that states are the principal actors in world politics and that they use IOs to create social orderings appropriate to their pursuit of shared goals We start with the pursuit of efficiency and employ the logic of transaction costs economics and rational choice”); Barbara Koremenos et al., *The Rational Design of International Institutions*, 55 INT’L ORGS. 761, 762 (2001) (“Our basic presumption, grounded in the broad tradition of rational-choice analysis, is that *states use international institutions to further their own goals, and they design institutions accordingly.*”) (emphasis in original).

437. See, e.g., Rome Statute, *supra* note 28, Preamble (arguing that the court would lead to the “effective prosecution” of the “most serious crimes of concern to the international community,” “put an end to impunity,” and “contribute to the prevention of such crimes”).

438. See Yuval Shany, *Assessing the Effectiveness of International Courts: A Goal-Based Approach*, 106 AM. J. INT’L L. 225, 230 (2012) (arguing that states support international courts so that they can be successful in achieving their institutional goals).

439. See *supra* text accompanying notes 431–35.